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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, PETITIONER,

vs.

KING AND BOOZER, A PARTNERSHIP COMPOSED
OF TOM COBB KING AND SIMON ELBERT
BOOZER, AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

7

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OF THE STATE OF ALABAMA

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[fol. 1]

[Caption omitted]

[fol. 2]

**IN CIRCUIT COURT OF MONTGOMERY COUNTY,
ALABAMA**

In Equity. #12047

**KING & BOOZER, a Partnership Composed of TOM COBB KING
and SIMON ELBERT BOOZER, Residents of Calhoun County
Alabama,**

vs.

THE STATE OF ALABAMA

**NOTICE OF APPEAL FROM FINAL ASSESSEMENT BY THE STATE
DEPARTMENT OF REVENUE OF THE STATE OF ALABAMA ON,
TO WIT, MAY 15, 1941, ASSESSED AGAINST KING & BOOZER, A
PARTNERSHIP COMPOSED OF TOM COBB KING AND SIMON EL-
BERT BOOZER, RESIDENTS OF CALHOUN COUNTY, ALABAMA,
THE SUM OF \$1,236.71 TAXES AND \$123.67 PENALTIES AND
INTEREST, ASSESSED PURSUANT TO THE PROVISIONS OF THE
ALABAMA SALES TAX ACT, ACT NUMBER 18, HOUSE BILL 82,
APPROVED FEBRUARY 8, 1939, FOR THE PERIOD JANUARY 1,
1941, TO MARCH 31, 1941, BOTH INCLUSIVE—Filed May 16,
1941**

King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama, with its office and principal place of business in Anniston, Calhoun County, Alabama, hereby files notice of appeal from final assessment made by the State Department of Revenue of Alabama, for sales taxes pursuant to Act No. 18, House Bill 82, approved February 8, 1939, for the period January 1, 1941 to March 31, 1941, both inclusive, said final assessment being dated March 15, 1941.

Preliminary notice of such assessment was made by the State Department of Revenue on May 15, 1941, and was duly protested in writing by King & Boozer, a partnership as aforesaid, within the time allowed by law, on May 15, 1941, at which time King & Boozer, a partnership as aforesaid, did waive notice and demand for the payment of any alleged deficiencies in sales taxes claimed to be due by it for the period January 1, 1941 through March 31, 1941, and further waived any and all notice which might be required

by law for the entry or the making on the 15th day of May 1941 of a deficiency assessment by the State Department of Revenue against the partnership of King & Boozer for the period January 1, 1941, through March 31, 1941 aforesaid, and it further waived notice of hearing on said assessment and consented to a hearing by the State Department of Revenue on the 15th day of May 1941.

Upon a hearing before the State Department of Revenue upon the protests aforesaid of King & Boozer, a partnership as aforesaid, preliminary notice of assessment above mentioned was made final by the State Department of Revenue [fol. 3] on May 15, 1941, in the amount of \$1,372.71, or \$1,236.71 Taxes, and \$123.67 penalties.

This notice is filed as provided by law with the State Department of Revenue and with the Register of the Circuit Court of Montgomery County, Alabama, in equity, and this appeal is taken pursuant to the provisions of Section 18 of Act Number 18, House Bill 82, approved February 8, 1939, and pursuant to, and in conformity with Act Number 154, approved April 21, 1936, being entitled "An Act to amend Section 103 of Article IV of an Act entitled 'To provide for the General Revenue of the State of Alabama', approved July 10, 1935, pertaining to and providing for appeals from final assessments by the State Tax Commission".

In addition to the filing of this notice of appeal, appellant has given bond contemporaneously herewith in double the amount of taxes and penalties shown to be due by final assessment, together with all costs accruing by virtue of this appeal, payable to the State of Alabama, and conditioned as provided by law.

Appellant alleges that said final assessment made as aforesaid is illegal and void, among other things, in each of the respects as shown by the protests made to such assessment, a copy of which is hereto attached and made a part hereof;

Wherefore, appellant prays that said assessment be annulled, vacated, and held for naught.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama, by Tom Cobb King, Thomas D. Samford, Attorney. Fred L. Blackmon, Knox, Liles, Jones & Blackmon, Attorneys.

The foregoing notice of appeal to the Circuit Court of Montgomery County, Alabama, in equity, was duly filed in

this office on the 16 day of May, 1941, within the time required by law.

This the 16 day of May, 1941.

State Department of Revenue, by Julia Klinge, Secretary.

[fol. 4] The foregoing notice of appeal to the Circuit Court of Montgomery County, Alabama, in equity, was duly filed in this office on the 16th day of May, 1941, within the time required by law, at which time the appellant executed and delivered the bond required by Act No. 154, approved April 31, 1936, being Act No. 154 of the General and Local Laws of Alabama, Extra Session, 1936, p. 172.

George H. Jones, Jr., Register, Circuit Court of Montgomery County, Alabama, in Equity.

PROTEST TO PROPOSED ASSESSMENT

To the State Department of Revenue of the State of Alabama, John C. Curry, Commissioner of Revenue of the State of Alabama:

Comes now King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, both residents of Calhoun County, Alabama, and protests the proposed assessment made against it as shown by notice of assessment dated May 15, 1941, and received by it on May 15, 1941 which notice and assessment purports to assess a tax of \$1,236.71 under the provisions of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939 for the period January 1, 1941 to March 31, 1941, both inclusive, together with the sum of \$123.67, assessed as penalty and the sum of \$—, interest upon the amount of said tax at the rate of one-half of one per cent per month from the 20th day of April, 1941.

The grounds of this protest are as follows:

1. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment is based upon sales of tangible personal property to the United States or to the United States through one of its agencies or instrumentalities which are immune from taxation by the State of Alabama under the Constitution of the United States.

2. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is based on sales of tangible personal property to the United States which are immune and exempt from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama.

3. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is made upon sales of tangible personal property exempt from taxation under Subsection (a) of Section 7 of Act No. 18 of the Legislature of Alabama, session of 1939, as approved [fol. 5] February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939 at pages 16, 18.

4. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agent or instrumentality of the United States on or for the account of the United States exclusively, and immune from taxation under the Constitution of the United States and the Statutes of Alabama.

5. The assessment of May 15, 1941 is illegal and void for the reason that said assessment was made upon sales of tangible personal property not consummated within the taxing jurisdiction of the State of Alabama.

6. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment was made upon or with respect to sale of tangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama for the reason that said assessment was of or on account of sales made to the United States, or to the agents or instrumentalities of the United States on and for the behalf of the United States exclusively.

7. The assessment of May 15, 1941 above mentioned is illegal and void for the reason that said assessment is based upon sales made to the United States, the taxation of which

by the State of Alabama is violative of the Constitution of the United States.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, (Signed) by Tom Cobb King, Partner.

[File endorsement omitted.]

[fol. 6] Supersedeas bond on appeal for \$2,800.00, approved and filed May 16, 1941, omitted in printing.

[fol. 7] Cost bond on appeal for \$500.00, approved and filed May 16, 1941, omitted in printing.

[fol. 8] BEFORE THE STATE DEPARTMENT OF REVENUE

The following is a transcript of the records of the State Department of Revenue in the matter of the assessment of sales tax against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, of Calhoun County, Alabama, for the period January 1, 1941, to March 31, 1941, both inclusive, for the purpose of an appeal to the Circuit Court of Montgomery County, in equity:

PROPOSED ASSESSMENT

Whereas, said return and computation have been examined and approved by the Department, and the same have been ascertained and determined to be correct; and

Whereas, said Taxpayer has expressly waived in writing any and all notice required to be given by law for the making or entry of this assessment on this date;

It is Ordered by the State Department of Revenue and the State Department of Revenue does hereby assess against said Taxpayer the sum of One Thousand Two Hundred Thirty-six and 71/100 Dollars (\$1,236.71), as and for the privilege or license tax for said period, plus the sum of [fol. 9] One Hundred Twenty-three & 67/100 Dollars (\$123.67) penalty thereon, due by said Taxpayer under the provisions of said Act, together with interest upon the

amount of said tax at the rate of one-half of one percent per month, or any fraction thereof, from the date the same became due and payable under the provisions of said Act, namely, from the 20th day of April, 1941; and it is further ordered that a hearing upon said assessment be and the same is hereby set for 10 o'clock A. M., on the 4th day of June, 1941, and that due notice of said hearing be given to said Taxpayer, as required by law, to appear and show cause, if any, why said assessment should not be made final.

Dated the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue. (Signed) Julia Klinge, Secretary.

SALES TAX RETURN

Required by House Bill 82, Approved Feb. 8, 1939

For the Period Beginning Jan. 1, 1941 and Ending March 31, 1941

King & Boozer, Anniston, Ala.

State kind and class of business: Partnership.

Computation of Tax

1. Sales only to Dunn-Hodgson Const. Co. at Ft. McClellan, Tax not previously paid	\$61,835.63
5. Total amount remaining as measure of tax (2 minus 4)	\$61,835.63
6. Amount of Tax (Equal to 2% of item 5)	\$1,236.71
14. Total amount of Tax due (Total of item 6 and item 13)	\$1,236.71
16. Add penalty and interest if any (See penalties page 4) Pen. \$123.67, Int. to 5/21/41, \$12.37	\$ 136.04
17. Total due for which remittance is attached	\$1 372.75

[fol. 10] We acknowledge receipt of a copy of the foregoing notice, May 15, 1941.

King & Boozer, by Tom Cobb King, Partner.

BEFORE STATE DEPARTMENT OF REVENUE

NOTICE OF ASSESSMENT

(For deficiency assessment)

To: King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Anniston, Calhoun County, Alabama, Taxpayer:

Notice is hereby given that upon examining and auditing your records and from other information, and upon examining the return made by you of the gross proceeds of sales or gross receipts of business and the privilege or license tax computed thereon under the provisions of the Alabama Sales Tax Act (Act No. 18, H. 82, approved February 8, 1939) for the period: January 1 through March 31, 1941, the State Department of Revenue has ascertained and determined that the said return is incorrect and the Department has computed the correct amount of said tax due by you for said period and has notified you thereof, which said amount was not paid within ten (10) days after demand; and the Department has on this date, after allowing credit for the amount paid by you, made and entered a deficiency assessment against you in accordance with said notice and demand in the amount of Twelve Hundred Thirty-six and 71/100 Dollars (\$1,236.71), as and for the tax due by you for said period, plus the sum of One hundred twenty-three and 67/100 Dollars (\$123.67) penalty thereon under the provisions of Section XIV of said Act for failure to pay the tax levied by said Act within the time required by law, together with interest upon the amount of said tax at the rate of $\frac{1}{2}$ of 1% per month, or any fraction thereof, from the date the same became due and payable under the provisions of said Act, which sums in the aggregate amount to Thirteen hundred seventy-two and 75/100 Dollars (1,372.75) computed to the date of this notice.

As provided by Section XVII of said Act, you are hereby notified to appear before this Department at 10 o'clock [fol. 11] A. M. on the 4th day of June, 1941, and show cause, if any, why such assessment should not be made final.

This notice is sent you by registered mail as provided by said Act.

In Witness Whereof, the State Department of Revenue, acting by and through John C. Curry, as Commissioner of Revenue, hereunto sets its name and official seal, this the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue.

We acknowledge receipt of a copy of the foregoing notice, May 15, 1941.

King and Boozer, by Tom Cobb King, Partner.

WAIVER OF NOTICE AND DEMAND, ETC.

To the State Department of Revenue, Montgomery, Alabama:

The undersigned do hereby waive notice and demand for the payment of any alleged deficiency in sales tax claimed to be due by us for the period January 1, 1941 through March 31, 1941; and do further waive any and all notice which may be required by law for the entry or making on this the 15th day of May, 1941, of a deficiency assessment by the State Department of Revenue against us under said Act for said period. Notice of hearing on said assessment is hereby waived and we hereby do consent that a hearing on said assessment be held on this the 15th day of May, 1941.

Dated May 15, 1941.

King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, by (Signed) Tom Cobb King, Partner.

Received, May 15, 1941.

State Department of Revenue, (Signed) Julia Klinge, Secretary.

[fol. 12] Protest omitted. Printed side page 4 ante.

[fol. 13] 6. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment was made upon or with respect to sales of tangible personal

property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama for the reason that said assessment was of or on account of sales made to the United States, or to the agents or instrumentalities of the United States on and for the behalf of the United States exclusively.

7. The assessment of May 15, 1941, above mentioned is illegal and void for the reason that said assessment is based upon sales made to the United States, the taxation of which by the State of Alabama is violative of the Constitution of the United States.

King & Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, by (Signed) Tom Cobb King, Partner.

BEFORE STATE DEPARTMENT OF REVENUE, MONTGOMERY,
ALABAMA

MINUTE ENTRY, FINAL ASSESSMENT.

STATE OF ALABAMA

vs.

KING & BOOZER, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, Taxpayer.

Whereas, on the 15th day of May, 1941, an assessment was made by the State Department of Revenue against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, of Anniston, Calhoun County, Alabama, hereinafter called Taxpayer, under and in accordance with the provisions of the Alabama Sales Tax Act, (Act No. 18 of the General Acts of Alabama of 1939, approved February 8, 1939) for sales tax in the amount of One Thousand Two Hundred Thirty-six & 71/100 Dollars (\$1,236.71) tax, plus One Hundred Twenty-three & 67/100 Dollars (\$123.67) penalty thereon, together with interest upon the amount of said tax at the rate of one-half of one per cent per month, or any fraction thereof, from April 20, 1941, the date the

same became due and payable under the provisions of said [fol. 14] Act for the period January 1, 1941, through March 31, 1941; and

Whereas, said Taxpayer having expressly waived in writing any and all notice as required by law for the hearing of said assessment, and having consented in writing to a final hearing thereon forthwith on this the 15th day of May, 1941; and

Whereas, said Taxpayer having appeared on this day in person and by attorney and filed a protest in writing as to the legal liability for said deficiency tax claimed to be due by said Taxpayer under said Act for said period; and

Whereas, it appearing that said deficiency assessment as made is correct and should be made final;

It Is, Therefore, Ordered that said deficiency assessment be and the same is hereby made final, and that execution be issued therefor.

Dated this the 15th day of May, 1941.

State Department of Revenue, by (Signed) John C. Curry, Commissioner of Revenue; (Signed) Julia Klinge, Secretary.

NOTICE OF FINAL ASSESSMENT

To King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Anniston, Calhoun County, Alabama, Taxpayer.

Notice is hereby given that upon a hearing before the State Department of Revenue, held on this date pursuant to written consent filed by you, the State Department of Revenue, made final as assessment against you in the amount of Twelve Hundred Thirty-six & 71/100 Dollars (\$1,236.71), tax, plus One hundred twenty-three & 67/100 Dollars (\$123.67) penalty thereon, due by you under the provisions of the Alabama Sales Tax Act (Act No. 18, H. 82, approved February 8, 1939), for the period:

January 1, 1941 through March 31, 1941, and unless the amount of said assessment, together with interest upon the amount of said tax from the date the same became due and payable under said Act (which in the aggregate amounts to

Thirteen hundred seventy-two and 75/100 Dollars (\$1,372.75), to the date of this Notice), is paid, or appeal therefrom is taken, as provided by law, within fifteen days [fols. 15-17] from this date, as execution therefor may be issued by the Department.

In Witness Whereof, the State Department of Revenue, acting by and through John C. Curry, as Commissioner of Revenue, hereunto sets its name and official seal, this the 15th day of May, 1941.

State Department of Revenue, (Signed) John C. Curry, Commissioner of Revenue; (Signed) Julia Klinge, Secretary.

We acknowledge receipt of a copy of the foregoing notice.
May 15, 1941.

King & Boozer, by Tom Cobb King, Partner.

Notice of Appeal omitted. Printed side page 2 ante.

[fol. 18] Secretary's Certificate to foregoing transcript omitted in printing.

[fol. 19] BEFORE STATE DEPARTMENT OF REVENUE

State of Alabama,

SALES TAX RETURN

Required by House Bill 82, Approved Feb. 8, 1939. For the Period Beginning Jan. 1, 1941, and Ending March 31, 1941.

King and Boozer	Account No.	Name:
Formerly the below Co.	8 1176	King and Boozer
King Metal Products,	8 1176	St. Address:
Box 788, Anniston, Ala.		Box #788,
		Anniston, Ala.,
		County, Calhoun.
		State Kind and Class of Business:
		Iron-Steel-Lumber Mfg.

Computation of the Tax.

1. (a) Total Gross sales (both cash and credit) for period covered by this report, ex- cept sales of automotive vehicles (Tax- payers other than sellers of tangible personal property report gross re- ceipts	\$113,584.94
3. (a) Sales made at wholesale (cash and credit) (see wholesale sales reverse side)	
(b) Less taxable retail credit sales during period not collected	\$39,075.83
(g) Sales in interstate commerce	\$70,134.30
[fol. 20] (h) Sales to U. S. Gov., State of Ala., Counties and incorporated cities and towns within Ala.	\$3,553.98
4. Total Deductions (Total of item 3)	\$112,764.11
5. Total amount remaining as measure of tax (2 minus 4)	820.83
6. Amount of tax (Equal to 2% of item 5)	16.42
17. Total due for which remittance is attached	16.42

This 19 day of April, 1941.

King and Boozer, Signature, T. C. King.

Secretary's Certificate to foregoing paper omitted in
printing.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

WITHDRAWAL OF APPEARANCE OF THOMAS D. SAMFORD—Filed
May 29, 1941

By leave of Court first had and obtained, comes Thos. D.
Samford and withdraws his appearance as attorney for
appellants King & Boozer, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, in the above styled
cause.

Thomas D. Samford.

[fol. 21] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

PETITION OF UNITED STATES FOR LEAVE TO INTERVENE—Filed
May 29, 1941

Comes now the United States of America, a corporation sovereign and body politic, by Thomas D. Samford, United States Attorney for the Middle District of Alabama, and moves the Court for leave to intervene in the above styled statutory appeal from a final assessment made by the State Department of Revenue of the State of Alabama against the appellant for sales taxes for the period January 1, 1941, through March 31, 1941, both inclusive, being dated May 15, 1941, and made pursuant to the provisions of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, and as grounds for such intervention respectfully represents to the Court as follows:

1. The assessment of May 15, 1941, above mentioned, and which is assailed herein, is based upon sales made by the appellant of tangible personal property to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for the use and consumption by said partnership in and about the performance by it of a contract entered into by it with the United States for the construction of a complete tent camp and other military facilities for the United States at Camp McClellan, in the State of Alabama. Said contract provides that the cost of performing and executing the same, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the United States and reimbursement therefor made by the United States to the aforesaid partnership. The United States, therefore, is directly and immediately affected by the assessment of May 15, 1941, the validity of which is assailed in this appeal and is a necessary and proper party to these proceedings.

2. The assessment of May 15, 1941, above mentioned and which is assailed herein is based upon the sales by the appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and

John S. Hodgson and Company, one of its agencies and instrumentalities, which are immune from taxation by the State of Alabama under the Constitution of the United States of America.

3. The assessment of May 15, 1941, above mentioned and which is assailed herein as illegal and void, is based upon [fol. 22] sales of tangible personal property by the appellant to the United States which are immune and exempt from taxation by the State of Alabama under the Constitution of the United States of America and the Statutes of Alabama.

4. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon sales of tangible personal property expressly exempt from taxation under subsection (a) of Section V of Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939, at pages 16, 18.

5. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agency or instrumentality of the United States on or for the account of the United States exclusively, and immune from taxation under the Constitution of the United States of America and the Statutes of Alabama.

6. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was made upon or with respect to sales of intangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States, all of which such sales are immune from taxation by the State of Alabama under the Constitution of the United States of America and the Statutes of Alabama.

7. The assessment of May 15, 1941, above mentioned and which is assailed herein, is illegal and void for the reason that said assessment was based upon sales made to the United States, the taxation of which by the State of Alabama is violative of the Constitution of the United States of America.

8. The sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned is based were sales to the United States, or to Dunn Construction Company and John S. Hodgson & Company, a partnership, for or on behalf of the United States, which sales were consummated at Camp McClellan, Anniston, Alabama, which is within an area over which the United States has exclusive jurisdiction, and having been made upon said Federal area said sales are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

9. The Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, when applied to sales to or purchases by the United States or its agencies and instrumentalities is violative of the Constitution of the United [fol. 23] States of America and void.

10. The provision of the Alabama Sales Tax Act, Act No. 18, House Bill 82, approved February 8, 1939, in requiring the appellant to collect the tax imposed thereunder from its vendee, the partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, and the provisions of the contract aforesaid, between the United States and the partnership aforesaid, requiring the United States to reimburse said partnership for the cost of performing and executing the same, including the purchase price of materials necessary therefor, and the amount of any applicable and valid taxes incurred by it in the performance of said contract, constitutes the United States a real party in interest to the assessment of May 15, 1941, which is assailed herein and a proper party intervener to this appeal.

Respectfully submitted, United States of America, by
Thomas D. Samford, United States Attorney, and
by Hartwell Davis, Asst. United States Attorney.

[File endorsement omitted.]

Refiled in open Court by leave of Court as the Petition of Intervention of the United States of America, as Intervenor.
United States of America, by Thomas D. Samford,
United States Attorney, and by Hartwell Davis,
Asst. United States Attorney.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

EXCEPTIONS AND MOTION TO STRIKE PETITION FOR LEAVE TO
INTERVENE—Filed May 29, 1941

Comes the State of Alabama, Appellee in the above stated cause, and objects to the granting of leave on behalf of the United States of America to intervene in said cause, as prayed for in petition for leave to intervene filed by the United States of America in this cause on the 29 day of May, 1941, and for grounds of such objection assigns, separately and severally, the following:

1. It is not shown thereby that the United States of America is a necessary or proper party in this cause.
2. Said petition fails to set forth sufficient facts to show any right or necessity on behalf of the United States of America to intervene.
3. For that it appears from said petition that the United States of America expressly consented to and agreed to the payment of said tax by the contractor, and to reimburse said contractor therefor.
4. There is no equity in said petition.
5. That the said petition states no grounds or cause for intervention in said cause by the United States.
6. It affirmatively appears from said petition that the assessment is based upon sales made by the Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, as contractors, in a joint-venture, for the use and consumption by said contractors, and not to the United States or any agency or instrumentality thereof.
7. For that it appears from said petition that the United States had agreed and assumed to bear the amount of any applicable and valid taxes, and to reimburse said contractors therefor.
8. For that it appears the allegation that the assessment of May 15, 1941, is based upon the sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company,

Inc., and John S. Hodgson and Company, a partnership, one of its agencies and instrumentalities, is a mere conclusion of the pleader, and is unsupported by any fact or facts set forth in said petition.

9. The allegation that said Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, are immune from taxation by the State of Alabama under the Constitution of the United States, is a mere conclusion of the pleader and is unsupported by any fact or facts set forth in said petition.

10. For that said allegation that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States, is inconsistent with and contrary to said allegation in the petition to the effect that said sales were made to said contractors with the United States, and is a mere conclusion of the pleader, unsupported by any fact or facts set forth in said petition.

11. For that it is not shown that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, referred to in said petition as a partnership, are any agency or instrumentality, or agencies or instrumentalities of the United States, and exempt from taxation by the State of Alabama.

12. For that it is not shown that the United States will be directly or indirectly affected or injured by the judgment of the Court in this cause.

13. For that it affirmatively appears that said sales of tangible personal property were made to independent contractors with the United States and not to any agency or instrumentality of said Government.

14. For that said petition attempts to attack therein the validity of said assessment, and fails to show or allege wherein or for what reason the United States of America has such an interest in the decision of said cause as to allow it to intervene herein.

15. For that said petition attempts and purports to try and determine the validity of said assessment in said petition, to the exclusion of said Appellant in said cause.

16. For that it does not appear that said contractors, namely, Dunn Construction Company, Inc., and John S.

Hodgson and Company, are objecting to or protesting the payment of said assessment made against the Appellant in this cause.

17. For that it appears from said petition that the interests of the Appellant and the United States in said cause are adverse to one another.

18. For that it does not appear that the United States made or filed objection or objections with the State Department of Revenue of Alabama to the making of the assessment against the Appellant.

19. For that it does not appear that the Appellant has consented to or is willing for the United States to intervene in its behalf in said cause.

20. For that it appears that if said assessment is invalid and unconstitutional and a direct burden upon the United States, the United States will not be bound thereby and will not be obligated to reimburse said contractors for the amount or amounts expended by them in payment of such invalid or unconstitutional taxes or assessment.

21. For that it is not alleged or shown in said petition that the United States has an interest in the matter of litigation, or in the success of either of the parties to said cause, or an interest against both of said parties.

22. For that it does not appear that the United States filed this petition to intervene before the trial in this Court.

23. For that it does not appear that the United States [fol. 26] intervened or filed a petition to do so before the State Department of Revenue on the hearing of the assessment made in this cause.

24. For that said petition is not made by complaint and does not set forth the ground upon which the interests of the United States are based.

25. For that it is not alleged that the United States is obligated by contract or otherwise to pay to the State of Alabama or the Appellant or said contractors the assessment made against the Appellant in this cause.

26. For that it appears that the interest of the United States in this cause, if any, is remote and consequential, and is not in issue in this cause.

And Appellee separately moves to strike the petition from the file in this cause, and for grounds of said motion assigns, separately and severally, the following:

1. It assigns, separately and severally, each of the grounds assigned by it hereinabove in its objection to said petition or to the granting of leave to the United States of America to intervene in this cause.

Thomas S. Lawson, Attorney General of the State of Alabama; John W. Lapsley, Assistant Attorney General of the State of Alabama; J. Edward Thornton, Assistant Attorney General of the State of Alabama.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

ORDER PERMITTING THE UNITED STATES OF AMERICA TO INTER-
VENE—Filed May 29, 1941

This cause came on this day to be heard on the petition of the United States of America, a corporation sovereign and body politic, by its attorney, Thomas D. Samford, United States Attorney for the Middle District of Alabama, and filed its petition for leave of this Court to intervene herein.

Upon consideration thereof it is adjudged, ordered and decreed that the United States be, and it hereby is, granted [fol. 27] leave to appear herein as a party intervener.

Done this May 29, 1941.

Jones, Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEMURRER AND ANSWER TO PETITION OF INTERVENTION—
May 29, 1941

Comes the State of Alabama, Appellee in the above styled cause, and for answer to the Petition for Intervention, filed

in this cause, by the United States, as Intervener, makes the following defenses:

First Defense

Demurrer

Comes the State of Alabama, Appellee in said cause and demurs to said Petition of the United States, as Intervener, filed in this cause, and for grounds of said demurrers assigns, separately and severally, the following:

1. There is no equity in said petition.
2. It is not shown thereby that the United States of America is a necessary or proper party in this cause.
3. Said petition fails to set forth sufficient facts to show any right or necessity on behalf of the United States of America to intervene in the above stated cause.
4. For that it appears from said petition that the United States of America expressly consented to and agreed to the payment of said tax by the contractor, and to reimburse said contractor therefor.
5. That the said petition states no grounds or cause for intervention in said cause by the United States.
6. It affirmatively appears from said petition that the assessment is based upon sales made by the Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, as contractors, in a joint-venture, for the use and consumption by said contractors, [fol. 28] and not to the United States or an agency or instrumentality thereof.
7. For that it appears from said petition that the United States had agreed and assumed to bear the amount of any applicable and valid taxes, and to reimburse said contractors therefor.
8. For that the allegation that the assessment of May 15, 1941, is based upon the sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, one of its agencies and instrumentalities, is a mere conclusion of the pleader, and is unsupported by any fact or facts set forth in said petition.

9. The allegation that said Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, are immune from taxation by the State of Alabama under the Constitution of the United States, is a mere conclusion of the pleader and is unsupported by any fact or facts set forth in said petition.

10. For that said allegation that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States, is inconsistent with and contrary to said allegation in the petition to the effect that said sales were made to said contractors with the United States, and is a mere conclusion of the pleader, unsupported by any fact or facts set forth in said petition.

11. For that it is not shown that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, referred to in said petition as a partnership, are an agency or instrumentality, or agencies or instrumentalities of the United States, and exempt from taxation by the State of Alabama.

12. For that it is not shown that the United States will be directly or indirectly affected or injured by the judgment of the Court in this cause.

13. For that it affirmatively appears that said sales of tangible personal property were made to independent contractors with the United States and not to any agency or instrumentality of said Government.

14. For that said petition attempts to attack therein the validity of said assessment, and fails to show or allege wherein or for what reason the United States of America has such an interest in the decision of said cause as to allow it to intervene herein.

15. For that said petition attempts and purports to try and determine the validity of said assessment in said petition, to the exclusion of said Appellant in said cause.

[fol. 29] 16. For that it does not appear that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, are objecting to or protesting the payment of said assessment made against the Appellant in this cause.

17. For that it appears from said petition that the interests of the Appellant and the United States in said cause are adverse to one another.

18. For that it does not appear that the United States made or filed objection or objections with the State Department of Revenue of Alabama to the making of the assessment against the Appellant.

19. For that it does not appear that the Appellant has consented to or is willing for the United States to intervene in its behalf in said cause.

20. For that it appears that the interest of the United States in this cause, if any, is remote and consequential, and is not in issue in this cause.

Second Defense

As and for a second defense to said petition and without waiving the demurrers separately and severally interposed by the Appellee and incorporated hereinabove, but insisting thereon, the Appellee, State of Alabama, in answer to said petition says:

1. In answer to paragraph numbered 1, the Appellee admits that the assessment of May 15, 1941 is based upon sales made by the Appellant of tangible personal property to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for the use and consumption by said contractors in and about the performance by it of a contract entered by it with the United States for the construction of a complete tent camp and other military facilities for the United States at Camp McClellan in the State of Alabama. The Appellee avers that the sales which were the basis of the assessment in this cause were begun and fully consummated and completed, including the payment to the Appellant by Dunn Construction Company, Inc., and John S. Hodgson and Company of the sales price thereof, during the period from January 1, 1941 to March 31, 1941.

The Appellee denies that the cost of performing and executing said contract, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, was agreed to be assumed and borne by the United States, but it admits that the United States agreed to reimburse said contractors therefor. Appellee

avers that the only and sole responsibility to the seller of [fol. 30] said material for the price thereof and any sales tax thereon or an amount equal thereto is upon said contractors as the purchasers of said material; and that the United States is under no liability for or to the State of Alabama or to the Seller of said material for the sale price thereof or any sales tax thereon; that the United States by express provision in its contract with said contractors relieved itself of all liability to any vendor for or on account of any purchases made by said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company in the performance of said contract; and that the only responsibility or liability of the United States by reason of or on account of said purchases of materials that were made by said contractors is to said contractors themselves, under and by virtue of said contract with said contractors. And the Appellant avers that the United States is not now nor has it been obligated or under any liability to the Appellant in this cause or the State of Alabama for or on account of the sales made by the Appellant of tangible personal property to said contractors; and that said assessment of May 15, 1941 is based upon said sales. And the Appellee avers that the United States is not now nor has it been liable or obligated to the State of Alabama or the Appellant in this cause for or by reason of said assessment of May 15, 1941.

The Appellee denies that the United States is directly and immediately affected by said assessment of May 15, 1941, the validity of which is assailed on this appeal. And the Appellee avers that the United States has no interest in nor is affected by said assessment, and that the United States is not a necessary, indispensable, or proper party to these proceedings. The Appellee further avers that, in any event, the United States by said contract with said contractors waived any immunity that exists or may have existed, in this, that it consented to the imposition of any and all taxes that may be levied upon or with respect to the purchase of materials by said contractor.

2. In answer to paragraph numbered 2, the Appellee denies that the assessment of May 15, 1941, is based upon sales by the Appellant of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson and Company; and Appellee avers that said sales were directly

made to said Dunn Construction Company, Inc., and John S. Hodgson and Company as independent contractors with the United States and not to the United States or for the use or account of the United States. And the Appellee avers that said contractors at the time of said purchases were not an agency or instrumentality of the United States, and that said contractors were, as purchasers and consumers of such material or tangible personal property, subject [fol. 31] to the provisions of the Alabama Sales Tax Act, and to the payment of said tax or the amount thereof to the seller of such property.

3. In answer to paragraph numbered 3, the Appellee denies that the assessment of May 15, 1941, is based upon sales of tangible personal property by the Appellant to the United States; and avers that said sales were made to said contractors composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, and upon the sole credit of said contractors, and that said sales are not immune or exempt from taxation by the State of Alabama under the Constitution of the United States or the Statutes of Alabama.

4. In answer to paragraph numbered 4, the Appellee denies that the said assessment of May 15, 1941, is illegal and void for the reason that said assessment was made upon sales of tangible personal property expressly exempt from taxation under Sub-section (a) of Section V of Act No. 18 of the Legislature of Alabama, approved February 8, 1939; and Appellee avers that said assessment is legal and valid and that said sales are not exempt by said Act as alleged in said paragraph.

5. In answer to paragraph numbered 5, the Appellee denies that said assessment of May 15, 1941, is illegal and void for the reason that said assessment was made upon sales of tangible personal property to an agency or instrumentality of the United States on or for the account of the United States exclusively; and the Appellee avers that said sales were made to an independent contractor which was not an agency or instrumentality of the United States, nor were such purchases made for or on account of the United States.

6. In answer to paragraph numbered 6, the Appellee denies that the assessment of May 15, 1941 is illegal and void

for the reason that said assessment was made upon or with respect to sales of tangible personal property purchased by the United States, or for the use and benefit of the United States through an agent or instrumentality of the United States; and the Appellee avers that said assessment was made upon or with respect to sales of tangible personal property to an independent contractor or contractors with the United States for the use by such contractor or contractors in the performance by them of construction or building work within the State of Alabama; and the Appellee further avers that the imposition of said levy is not a direct or immediate burden upon the United States or the performance of its functions or activities; and that said assessment is legal and valid and such sales are subject to taxation by the State of Alabama.

7. In answer to paragraph numbered 7, the Appellee denies that the assessment of May 15, 1941 is illegal and void [fol. 32] for the reason that said assessment was based upon sales made to the United States. On the contrary, the Appellee avers that said sales were made to an independent contractor with the United States, and not to the United States or an agency or instrumentality thereof or for its use or benefit. The Appellee further avers that the taxation of said sales by the State of Alabama is not in violation of the Constitution of the United States of America.

8. In answer to paragraph numbered 8, the Appellee denies that the sales of tangible personal property upon which the assessment of May 15, 1941, is based, were sales to the United States, or to Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, for or on behalf of the United States. On the contrary, the Appellee avers that said sales were made directly to said contractors, for and on behalf of said contractors and not the United States of America, and that said contractors, during the period in which said sales were made, were independent contractors with the United States, and took title to and all interest and right in said tangible personal property in their own names and for and on behalf of themselves and not the United States of America, and that during said period said contractors were not an agency or instrumentality of the United States.

The Appellee denies that said sales were consummated at Camp McClellan, Anniston, Alabama; and further denies

that said Camp McClellan is an area over which the United States has exclusive jurisdiction. The Appellee avers that said sales were made and consummated at the place of business of said partnership of King and Boozer within the State of Alabama, and at a point not upon or within said Camp McClellan and not at a point upon or within an area over which the United States has or had at said time exclusive jurisdiction. The Appellee avers that delivery of said tangible personal property and the passage of title thereto took place within the State of Alabama at the place of business of said King and Boozer, and not upon or within an area over which the United States had or has exclusive jurisdiction. The Appellee avers that in any event said assessment was made as the levy of a license or privilege tax upon said King and Boozer for the privilege of engaging within this State in the business of selling at retail tangible personal property, and that even if the transfer of title or consummation of said sales took place within or upon an area over which the United States has exclusive jurisdiction, said assessment is *avlid* and legal in all respects and the State of Alabama possesses the jurisdiction and power to make the same.

9. In answer to paragraph numbered 9, the Appellee denies that the Alabama Sales Tax Act applies to direct sales [fol. 33] to or direct purchases by the United States or such of its instrumentalities or agencies as are created and controlled by it and which are entitled to deferral immunity from taxation; but Appellee avers that the Alabama Sales Tax Act as applied in this cause is valid and legal in all respects and is not in violation of the Constitution of the United States, nor does it constitute a direct or prohibited burden upon said sovereign or its activities or functions.

10. In answer to paragraph numbered 10, the Appellee denies that the United States is a real party in interest to the assessment of May 15, 1941, because of the fact that the Alabama Sales Tax Act compels the Appellant, King and Boozer, to collect the tax imposed upon it from its vendee, said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, or the fact that the provisions of the contract between the United States and said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, require the United States to reimburse said vendee for the amount of said tax as a part of the

cost of the construction provided for in said contract. The Appellee avers that the interest of the United States in this cause is remote and its liability for reimbursement under the provisions of said contract was duly authorized and is binding upon it as a contractual liability to said contractors, and that it is not a real party in interest to said assessment nor is it *aa* necessary or proper party to this cause.

And now having fully answered said petition, Appellee prays that it may be hence dismissed with its reasonable costs in this behalf expended.

Thomas S. Lawson, Attorney General of the State of Alabama; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General; Solicitors for Appellee, State of Alabama.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

PETITION OR BILL OF COMPLAINT—Filed May 29, 1941

To the Honorable Walter B. Jones, Judge of Said Court:

[fol. 34] Comes King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, Appellant in the above stated cause, and represents and shows unto Your Honor as follows:

1. That Appellant, King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, both of whom are over the age of twenty-one years and reside in Calhoun County in the State of Alabama; and that the Appellee in said cause is the State of Alabama.

2. That during the period from January 1, 1941, to March 31, 1941, Appellant, under said name of King & Boozer, was engaged in the manufacture and prefabrication of lumber and in the manufacture of portable or prefabricated houses, all of which were sold by Appellant in large quantities to purchasers buying in large quantities, chiefly the Federal Government, its departments and agencies.

3. That on, to-wit, the 15th day of May, 1941, the State Department of Revenue of the State of Alabama made and entered a deficiency assessment of sales tax against Appellant in the amount of \$1,236.71 tax, plus \$123.67 penalty thereon, together with interest upon the amount of said tax at the rate of one-half of one per cent per month, or any fraction thereof; from, to-wit, the 20th day of April, 1941, notice of which assessment and the demand for the payment thereof and of the date of the hearing of said assessment before said Department was waived by Appellant. That thereafter on said date, namely, the 15th day of May, 1941, Appellant appeared in person and by counsel and filed a protest against said assessment and the validity thereof. That thereupon on said date, upon a hearing of said protest, said protest was overruled and said assessment was made final, notice of which was given to and accepted by Appellant on May 15, 1941. That thereupon on May 16, 1941, Appellant, pursuant to the provisions of the Alabama Sales Tax Act, Act No. 18, approved February 8, 1939 (General Acts, Regular Session, 1939, p. 16), and Act No. 154, approved April 21, 1936 (General Acts, Extra Session, 1936, p. 172), filed in this Court a notice of appeal from said final assessment, and a copy of such notice of appeal was on said date filed with the State Department of Revenue, and in connection with said appeal, Appellant filed a supersedeas bond, as required by the provisions of said Act No. 154, which bond was duly approved by the Register of this Court, a certified copy of all of which proceedings before said State Department of Revenue, duly certified by Julia Klinge, Secretary of the State Department of Revenue, is on file in this Court.

3. Appellant alleges:

(a) That the assessment of May 15, 1941, was based upon the sales price of tangible personal property consisting of [fol. 35] lumber purchased by the United States or a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company, as an agent and instrumentality of the United States and in connection with the performance by the partnership of its contract with the United States, a copy of which is attached hereto, marked Exhibit A, and prayed to be read as a part hereof as if set out fully herein. Said contract

provides that the cost of performing and executing the same, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the United States of America and reimbursement therefore made by the United States to said partnership. The said personal property was purchased for use in and about the above mentioned construction, by the United States or by the aforesaid partnership as an agent and instrumentality of the United States and for an on behalf of the United States, at Camp McClellan, near Anniston, Alabama, of certain buildings, warehouses, and other camp and military facilities under the aforesaid contract. The purchases of the aforesaid partnership in connection with the performance of the said contract are immune from taxation by the State of Alabama under the Constitution of the United States of America fully as much as the purchases of the United States itself and are therefore immune under the Constitution of the United States of America from the tax imposed by Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939, at page 16. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(b) That the sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned is based were sales to the United States or to agents and instrumentalities of the United States for and on behalf of the United States, the taxation of which by the State of Alabama is taxation of the United States by the State of Alabama which is prohibited by and violative of the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(c) That the sales of tangible personal property upon which the assessment of May 15, 1941, is based were sales to the United States or to agents and instrumentalities of the United States who purchased for and on behalf of the United States exclusively and are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

[fol. 36] (d) That the sales of tangible personal property upon which the assessment of May 15, 1941, above mentioned

is based were sales to the United States, or to agents and instrumentalities of the United States for and on behalf of the United States, and exempt from the tax imposed by Act No. 18 of the General Acts of Alabama, Regular Session, 1939, under subsection (a) of Section V of that Act. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(e) That the State Department of Revenue in applying the provisions of Act No. 18 of the General Acts of Alabama, Regular Session, 1939, p. 16, to sales to the United States, or to the agents and instrumentalities of the United States for or on behalf of the United States, have applied the provisions of that Act in a manner which renders the said Act invalid and void under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(f) That the sales of tangible personal property which the assessment of May 15, 1941, above mentioned is based were sales to the United States but for or on behalf of the United States consummated at Camp McClellan, Anniston, Alabama, which is within an area within the exclusive jurisdiction of the United States and having been made upon said Federal area are immune from taxation by the State of Alabama under the Constitution of the United States. The assessment of May 15, 1941, is therefore illegal, contrary to law, and null and void.

(g) That the enactment of Act No. 18 of the Legislature of Alabama, Session of 1939, as approved February 8, 1939, as it appears in General Acts of Alabama, Regular and Special Session of 1939 at page 16, in so far as it authorizes the assessment of May 15, 1941, and subjects to taxation sales of tangible personal property to the United States or to the agents or instrumentalities of the United States for or on behalf of the United States is invalid and void because violative of the Constitution of the United States.

4. Appellant further alleges:

(a) That Appellant has presented to the partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company a bill for the taxes or for a sum equal in amount to said taxes which were assessed against Appellant as aforesaid in paragraph 3, but which taxes have not been paid.

The Premises Considered, Appellant prays Your Honor as follows:

1. That upon the final hearing of this cause, a decree be entered herein adjudging and decreeing said assessment to be illegal, contrary to law, and null and void, and that the [fol. 37] same be in all things cancelled and annulled.

2. That Appellant be granted all such other, further or different relief as the nature of this cause may require.

Knox, Liles, Jones & Blackmon, Fred L. Blackmon,
Solicitors for King & Boozer, a Partnership Com-
posed of Tom Cobb King and Simon Elbert Boozer.

NOTE.—Transcript of Exhibit "A" attached the above Bill of Complaint will be found on page 27 et seq. herein.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEMURRER AND ANSWER TO BILL OF COMPLAINT—Filed May
29, 1941

Comes the State of Alabama, Appellee in said cause, and for answer to the Bill filed by Appellant in this cause makes the following defenses:

First Defense

Demurrer

Comes the State of Alabama, Appellee in said cause, and demurs to the Bill filed by the Appellant in this cause, and for grounds of such demurrer assigns, separately and severally, the following:

1. There is no equity in the Bill.
2. Said Bill fails to set out facts sufficient to entitle the Appellant to the relief prayed for herein.
3. Said Bill fails to allege sufficient facts to show that the assessment of such tax was illegal.

4. Said Bill fails to allege sufficient facts to show that said tax was illegally levied or assessed against or collected from the Appellant.

5. Said Bill fails to allege sufficient facts to show that the tangible personal property sold at retail by the Appellant [fol. 38] was exempt from the provisions of the said Alabama sales tax Act, or from the tax assessed with respect thereto under said Act.

3. Said Bill fails to aver sufficient facts to show that said Appellant was or is immune from the tax alleged to have been levied or assessed against said Appellant.

7. The facts set forth in said Bill are insufficient to show that the said vendee or vendees of the said sales of tangible personal property viz., Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, were such an agency or instrumentality of the United States as would entitle it or them to assert or claim any immunity from the tax or assessment alleged to have been levied or assessed against the Appellant.

8. For that the facts alleged in said Bill show that the Appellant, namely, King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, was legally liable for the assessment against it of said tax, together with penalty and interest thereon.

9. For that the facts alleged in said Bill show that the United States of America consented to the imposition of the tax therein alleged to have been assessed against and paid by said vendee or vendees.

10. For that the facts alleged in said Bill show that the United States, in and by the terms of said contract therein mentioned, waived any immunity from said tax mentioned in said Bill with respect to the sale to or purchase by said vendee or vendees, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers.

11. For that the facts alleged in said Bill show that the United States in and by said contract between it and the said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, consented or agreed to permit the levy or imposition of said sales tax

upon said Appellant for and by reason of said sales by it to said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers.

12. For that the facts alleged in said Bill show that the United States, in and by said contract between it and said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, consented or agreed to the imposition or levying upon said Appellant of said sales tax by reason of said sales by Appellant to said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, in this, that the United States agreed and obligated itself in said contract to reimburse said Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, for the [fol. 29] amount of all taxes imposed upon them or the sale to them of materials for use in the construction of said project at Fort McClellan, Alabama.

13. For that said Bill is repugnant in its averments and in the relief prayed for in this: it avers that said vendee or vendees, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners or co-venturers, were immune from the payment of said tax to the Appellant, yet shows that the payment thereof was expressly consented and agreed to by said vendee or vendees and the United States of America.

14. For that the averments in said Bill to the effect that Dunn Construction Company, Inc., and John S. Hodgson and Company are agents or instrumentalities of the United States in the performance of said contract with the United States, are mere conclusions of the pleader, unsupported by the allegations of fact contained in said petition.

15. For that it appears from the facts alleged in said Bill that the United States expressly consented to the payment of said tax by the Appellant, and to the passing of said tax or an amount equal thereto by the Appellant to its contractor, Dunn Construction Company, Inc., and John S. Hodgson and Company, partners and co-venturers.

16. For that it appears that the United States has expressly consented to the levying, assessment, and payment of the taxes herein mentioned; or that it has expressly consented to reimburse its contractor for the amount expended by it in payment of said taxes.

17. For that the averments in said Bill to the effect that the transactions therein mentioned were immune from taxation by the State of Alabama are alleged as mere conclusions of the pleader, unsupported by the facts therein alleged.

18. For that said Bill fails to show wherein said taxes are invalid or illegally assessed against the Appellant.

19. For that the facts alleged in said Bill show that the Appellant therein mentioned is legally liable for said taxes and the penalty and interest thereon.

20. For that the facts alleged in said Bill show said tax was legally assessed against said Appellant under and pursuant to the provisions of said contract between the United States and Dunn Construction Company, Inc., and John S. Hodgson and Company, partners and co-venturers.

Second Defense

As and for a second defense to said Bill, and without waiving the demurrers separately and severally interposed [fol. 40] by Appellee and incorporated hereinabove, but insisting thereon, the Appellee, State of Alabama, in answer to said Bill says as follows:

1. The allegations of paragraph numbered 1 are admitted to be true.

2. In answer to paragraph numbered 2, the Appellee admits that during the period from January 1, 1941, to March 31, 1941, the Appellant, under said name of King & Boozer, was engaged in the manufacture and prefabrication of lumber and in the manufacture of portable or prefabricated houses. The Appellee, however, denies that all of said products or material manufactured by the Appellant were sold by the Appellant in large quantities to purchasers buying in large quantities; and further denies that said purchasers were chiefly the Federal Government, its departments and agencies.

In addition, the Appellee avers that the Appellant during said period was engaged in the business within this State of selling at retail tangible personal property, and as such seller was and is subject to the provisions and terms of the Alabama Sales Tax Act. The Appellee further avers that a substantial portion of the manufactured products, or ma-

terials, or tangible personal property manufactured by the Appellant, including the tangible personal property, the sale of which is made the basis of the assessment in this case, was sold by said Appellant within the State of Alabama at retail, and not for re-sale, within the meaning of the Alabama Sales Tax Act. The Appellee further avers that a substantial portion of the manufactured products, or materials, or tangible personal property manufactured by the Appellant, including the tangible personal property, the sale of which is made the basis of the assessment in this case, was sold at retail to independent contractors with the United States, for use by said contractors in the performance of construction contracts with the United States; and that said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, in the performance of said contract did not become such an agency or instrumentality of the United States as to be immune from State taxation in any respect, but that said Dunn Construction Company, Inc., was and is a private corporation, no stock of which is owned by the United States, and that said John S. Hodgson and Company was and is a partnership composed of private individuals, both of which contractors—whether acting jointly or severally—were during said period and still are engaged in business for private profit, and in the performance of said contract were independent contractors.

3. The Appellee admits the allegations contained in paragraph numbered 3 to be true. However, the Appellee further avers that said sales which were made the basis of the assessment of May 15, 1941, were fully and completely consummated and performed, including the payment of the sales price thereof, during the period from January 1, 1941, to March 31, 1941. The Appellee further avers that said sales were made during said period by Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, which purchasers were acting jointly, as independent contractors under and pursuant to their said contract with the United States.

3 (a). In answer to paragraph numbered 3 (a), the Appellee denies that the assessment of May 15, 1941, was based upon the sales price of tangible personal property, consisting of lumber, purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construc-

tion Company, Inc., and John S. Hodgson and Company, as an agent and instrumentality of the United States and in connection with the performance by the partnership of its contract with the United States. On the contrary, the Appellee avers that said assessment was based upon the retail sales price of tangible personal property consisting of lumber, which, during such period, was sold at retail by Appellant to Dunn Construction Company, Inc., and John S. Hodgson and Company, acting jointly as independent contractors in the performance of said contract with the United States; and that said contractors made said purchases and took title to said tangible personal property in their own names as such independent contractors with the United States for use by them in the construction of buildings and improvements mentioned in said contract, and which lumber was so used by said contractors in the performance of said contract; and Appellee denies that said contractors purchased said lumber as agents or instrumentalities of the United States, or that they purchased the same for resale or that they resold the same. The Appellee further avers that the United States was not and is not obligated or bound to the Appellant for or on account of such purchases by said independent contractors, but that such purchases were made solely upon the credit and liability of said independent contractors. The Appellee further avers that said purchases of tangible personal property were not made for or on account of or for the use of the United States of America, but that said property was purchased by said contractors in their capacity as independent contractors in the performance of their obligations under said contract, and was so used by them.

Appellee denies that in and by said contract therein mentioned, the United States agreed to purchase said lumber or building materials or to assume any liability to pay the purchase price or costs thereof, with respect to purchases of such materials made by the contractors in their own [fol. 42] names, or that the United States did, in fact, pay such cost or purchase price, but Appellee admits that under the terms of said contract the United States contracted and agreed as a part of the cost of construction incurred by the contractors, to pay the contractors the amount necessary to reimburse them for the cost of the purchases of such materials, including the amount of sales or use taxes incurred and paid by the contractors in connection with such pur-

chases. Appellee denies that said contractors were an agent or instrumentality of the United States or that said contractors purchased such property or materials for the United States or as agents for the United States but made such purchases in their own names, on their own responsibility and credit and for the purpose of enabling them to construct such improvements in the performance of said contract. Appellee denies that such purchases of materials so made by said contractors were or are immune from taxation by the State of Alabama under the Constitution of the United States or were or are immune from taxation under said Sales Tax Act or were or are exempt under the provisions of said Act, or were or are prohibited from being included within the computation of the tax liability of said Appellant, King and Boozer, under the terms and provisions of said Alabama Sales Tax Act; and Appellee denies that said assessment is illegal or that the requirements of said Act for the passing on of said tax or the amount thereof by said King & Boozer to said purchasers, namely, said contractors, is unconstitutional or invalid or that said assessment is illegal or invalid. For further answer to said paragraph, Appellee avers that said contract between the United States and said Contractors expressly provided for and required the payment by said contractors of all applicable sales taxes or use taxes which might be incurred by said contractors in the purchase by them of materials in connection with the performance by them of said contract, and for the reimbursement by the United States to said contractors of the amount of such taxes, which agreement Appellee avers is valid and binding upon the parties; and Appellee avers that in and by the terms of said contract, or in the performance thereof, with respect to purchases of materials so made by said contractors and involved in said assessment, the United States waived any immunity from said tax or with respect to the burden of said sales tax. Appellee further avers that the United States in and by said contract expressly reserved the right to directly purchase in its own name any of such material, and to furnish the same to said contractors for use by said contractors in such construction, and thus avoid the payment of any sales tax thereon or the economic burden of any such tax with respect thereto, but Appellee denies that the sales or purchases involved in said assessment were direct sales to [fol. 43] or purchases by the United States; and the Appel-

lee avers that the United States in and by said contract in and by the terms of the purchase made thereunder, as to sale involved in said assessment, validly agreed or consented thereto, and waived any immunity with respect to, the payment of said tax so assessed by the State of Alabama against said Appellant, King & Boozer, and to the passing on of said tax by Appellant to or the collection of said tax, or the amount thereof, from said contractor.

3 (b). In answer to paragraph numbered 3 (b) the Appellee denies that the sale of tangible personal property upon which the assessment of May 15, 1941 is based were sales to the United States or for and on behalf of the United States. On the contrary, the Appellee avers that said sales were made to independent contractors and not for or on behalf of the United States; and that said independent contractors were not agents or instrumentalities of the United States; and that said assessment is valid and legal in all respects.

3 (c). In answer to paragraph numbered 3 (c) the Appellee denies that said sales were made to the United States or to agents and instrumentalities of the United States who purchased for and on behalf of the United States exclusively; but the Appellee avers that said sales were made to independent contractors with the United States, who purchased for and on behalf of themselves as such contractors in the performance of said contract; and that said assessment is legal and valid in all respects.

3 (d). In answer to paragraph numbered 3 (d) the Appellee denies that said sales were made to the United States or to agents and instrumentalities of the United States for and on behalf of the United States. On the contrary, the Appellee avers that said sales as aforementioned were made to independent contractors with the United States; and that said sales are not exempt under subsection (a) of Sec. V of the Alabama Sales Tax Act.

3 (e). In answer to paragraph numbered 3 (e) the Appellee denies that the State Department of Revenue in applying the provisions of Act No. 18 of the General Acts of Alabama, Regular Session, 1939, page 16, to the sales made the basis of the assessment in this case, has applied the provisions of that Act in a manner which renders said Act invalid and void under the Constitution of the United States; and

the Appellee denies that said sales were made to the United States, or to its agents and instrumentalities, or for or on behalf of the United States.

3 (f). In answer to paragraph numbered 3 (f) the Appellee denies that the sales of tangible personal property upon which said assessment is based were sales to the United States, or for or on behalf of the United States, or that said sales were consummated at a point or place within an area [fol. 44] over which the United States has or had exclusive jurisdiction during said period. The Appellee further denies that said sales are immune from taxation by the State of Alabama as having been made and consummated upon an area over which the United States has exclusive jurisdiction.

On the contrary, the Appellee avers that said sales were made and consummated at the place of business of the Appellant in the State of Alabama, which place of business neither was nor is located upon Camp McClellan, Alabama, or upon an area over which the United States had exclusive jurisdiction during such period, in this, that inspection, delivery, and passage of title took place at said place of business of said Appellant, and said sales were fully consummated and performed at such place of business. The Appellee further avers that said sales took place and were fully performed and consummated, including the payment of the sales price thereof, during the period from January 1, 1941, to March 31, 1941, during which period in and by the terms of An Act of Congress (Public No. 819, 76th Congress, approved October 9, 1940), there was in force and effect an express release or waiver by the United States of exclusive jurisdiction over said Camp McClellan, insofar as such jurisdiction affected the power of the State to levy or impose a sales or use tax upon sales or purchases made upon or within any such area.

If appellee is mistaken in alleging that said sales were wholly consummated outside of the area known as Fort McClellan (or Camp McClellan) appellee avers that said sale- were not made wholly within such area and constituted transactions subject to the tax imposed upon Appellant under said Act and the assessment made pursuant thereto.

3 (g). In answer to paragraph numbered 3 (g) the Appellee denies that the enactment of Act No. 18 of the legislature of Alabama, Session of 1939, as approved February

8, 1939, (General Acts, Regular Session 1939, page 16) insofar as it authorizes the assessment of May 15, 1941, and subjects to taxation said sales of tangible personal property involved in said assessment is invalid and void because violative of the Constitution of the United States. The Appellee avers that said Act No. 18, known as the Alabama Sales Tax Act, and the assessment of May 15, 1941, made in pursuance and under the authority thereof, is valid and legal in all respects and is not in violation of the Constitution of the United States.

4 (a). The Appellee admits the allegations of paragraph numbered 4 (a), but does not admit or concede that the failure or inability of the Appellant to collect said taxes or a sum equal in amount thereto is a defense to the claim of the Appellee against the Appellant for the taxes due under and by reason of said assessment of May 15, 1941. The [fol. 45] Appellee avers that the Alabama Sales Tax is a license or privilege tax levied upon the seller for the privilege of engaging in the business of selling tangible personal property at retail, and that said Act requires the seller to add to the sales price of the tangible property an amount equal to the tax levied upon him as the seller, but that the failure, refusal, or inability of the seller to pass said tax on to the buyer does not relieve said seller from its liability to the State of Alabama for the tax levied by said Act.

And now having fully answered said Bill, the Appellee prays that it may be hence dismissed with its reasonable costs in this behalf expended.

Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General, Solicitors for Appellee.

[File endorsement omitted.]

[fol. 46] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS—Filed May 29, 1941

It is agreed by and between the Appellant and the Appellee in the above cause, by and through their respective attorneys of record, that the following stipulation of facts

shall be and constitute an agreed statement of facts on the submission or trial of said cause, and that the Court shall consider the same, insofar as material, as fully and completely as if testified to or introduced as evidence under the ordinary rules of evidence. Either party may introduce additional evidence on the hearing of said cause should it desire to do so.

Such stipulation and agreed statement of facts is as follows:

1. That the transcript of proceedings before the State Department of Revenue as certified by Julia Klinge, Secretary of the State Department of Revenue, under date of May 24, 1941, and filed in this cause is a true and correct copy of the proceedings had before said Department relating to the assessment involved in this cause, and that such certified transcript shall, upon said trial, be introduced in evidence and considered by the Court. The stipulation contained in this paragraph, however, shall not be construed as an admission by the Appellant of the legality or validity of the assessment shown therein, nor the liability for the tax, penalty or interest thereon mentioned in said assessment, nor as a waiver by the Appellant of any right with respect to any liability or purported liability of the said Appellant for the payment of any sales tax to the State of Alabama, nor as a waiver of any right of the Appellant to contest such assessment, or liability or the validity thereof, or the validity of any Act imposing or purporting to impose any such tax.

2. That Exhibit "1" attached hereto is a true and correct copy of the contract entered into by and between the United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, on the 9th day of September, 1941, and which contract, it is agreed, was in full force and effect during the period covered by the assessment hereinabove mentioned and involved in this cause; and which contract was executed for the construction of certain buildings and improvements mentioned in said contract, pursuant to and under the authority of the Acts of Congress mentioned in said contract, namely, Public [fol. 47] No. 611, 76th Congress, approved June 13, 1940, and Public No. 703, 76th Congress, approved July 2, 1940.

3. That Dunn Construction Company, Inc., is a corporation organized under the laws of the State of Delaware, with

its principal place of business in the State of Alabama at Birmingham, Alabama, in which corporation the United States owns no interest, and that John S. Hodgson and Company is a partnership composed of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham, Alabama, and the said Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter sometimes called the contractor), in the execution and performance of said contract aforementioned, were acting jointly as members of a co-venture.

4. Appellant is a partnership consisting of Tom Cobb King and Simon Elbert Boozer, both residents of the City of Anniston, Calhoun County, in the State of Alabama, and having its principal place of business in the City of Anniston in the State of Alabama. That the Appellant, during the period January 1, 1941, to and including March 31, 1941, was engaged at Anniston, Alabama, in the business of prefabricating lumber and the manufacture or prefabrication of portable houses for sale. That the sales of tangible personal property involved in this cause were made by the Appellant and made by the Appellant during the period from January 1, 1941, to and including March 31, 1941 (in addition to the sale at retail of tangible personal property reported to the State Department of Revenue in quarterly sales tax return filed by Appellant for said period, and upon which a tax in the amount of \$16.42 was paid), aggregated in gross sales price the sum of \$61,835.63, which amount was received by him during said period, with respect to which gross sales no sales tax return was made by Appellant to the State of Alabama, and no sales tax was paid thereon by Appellant to the State of Alabama. That the aforesaid sales of tangible personal property made by Appellant during the period January 1, 1941, to and including March 31, 1941, in the gross amount of \$61,835.63, and involved in the assessment in these proceedings, were made in the manner hereinafter set forth and stated with respect to certain building material, hereinabove described in purchase order number 2565, a true and correct copy of which order is hereto attached, marked Exhibit "3", and made a part hereof.

5. (a) That pursuant to a proposal previously submitted by the Appellant in writing to the partnership of Dunn Construction Company, Inc., and John S. Hodgson and Com-

pany, to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by said partner-[fol. 48] ship, Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter called contractor), of its contract entered into by said contractor with the United States of America on the 9th day of September, 1940, a true and correct copy of which contract is hereto attached, marked Exhibit "1", and made a part hereof, and which contract was in full force and effect during the period covered by the assessment here involved, and which said proposal had been submitted by the said contractor to the Constructing Quartermaster at Fort McClellan for his approval, and which had been approved by him, said contractor, on January 16, 1941, prepared and submitted to the Constructing Quartermaster a paper or document, of which Exhibit "2" hereto attached is a true and correct copy, and requested the approval by said Constructing Quartermaster of said purchase, which approval was endorsed thereon as shown by said Exhibit "2" hereto attached and made a part of this agreement. That Raymond P. Reeves whose name appears on said Exhibit "2" was an employee of said contractor.

(b) That thereafter on January 17, 1941, the said contractor submitted to the Appellant at Anniston, Alabama, an order for the material described in Exhibit "2", as shown by a true and correct copy of such order attached hereto, marked Exhibit "3", and made a part hereof. That the said Raymond P. Reeves whose name appears on said Exhibit "2" was an employee of the contractor aforesaid, and was the duly authorized agent of said contractor.

(c) That upon receipt of said purchase order mentioned in subsection (b) of this paragraph, Appellant, at its plant or principal place of business at Anniston in the State of Alabama, loaded the material ordered and mentioned in subsections (b) and (c) of this paragraph upon the trucks operated by a contract carrier engaged by Appellant for the purpose of transporting said lumber from Appellant's place of business at Anniston, Alabama, to a designated point within Fort McClellan.

(d) That at the time the Appellant loaded the lumber aforesaid upon the trucks of the contract carrier aforesaid and at the Appellant's place of business at Anniston in the

State of Alabama, the materials were checked and inspected and two reports thereof were made, one as shown by report entitled "Receiving and Inspection Report", a true and correct copy of which is hereto attached, marked Exhibit "4", and made a part hereof, and which was a report required to be made by the Constructing Quartermaster, and which report was signed by E. C. Overton, an employee of the contractor aforesaid, and by J. F. Thompson, an employee of the United States representing the Constructing [fol. 49] Quartermaster, and the other report entitled "Receiving and Inspection Report", a true and correct copy of which is hereto attached, marked Exhibit "4A" and made a part hereof, was a report made to the contractor, and was signed by said E. C. Overton and J. F. Thompson in their respective capacities as above stated.

(e) That the materials so delivered at Fort McClellan, and the materials mentioned and described in Exhibits "2", "3", "4" and "4A" were used in the performance of the contract aforesaid, a true and correct copy of which is hereto attached, marked Exhibit "1", and made a part hereof.

(f) Exhibit "5" hereto attached and made a part hereof is a true and correct copy of the original invoice of the Appellant to the contractor aforesaid on account of the purchase hereinabove described, and of said endorsements noted thereon. The endorsements made on this Exhibit were made thereon by the parties indicated, in the capacities indicated, and all appear upon the original of said invoice. The Appellant's invoice hereinabove mentioned and described was delivered to the contractor aforesaid on January 18, 1941, and on January 21, 1941, that invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by said contractor of said invoice, all of which will appear from Exhibit "6" which is a true and correct copy of the original invoice transmittal, and which is hereto attached and made a part hereof, and that the said invoice was approved for payment by said Constructing Quartermaster on January 29, 1941, as will be shown by Exhibit "7" hereto attached and made a part hereof.

(g) That thereafter but prior to February 3, 1941, said contractor, namely, Dunn Construction Company, Inc., and

John S. Hodgson and Company, issued their joint check payable to Appellant in full payment of invoice marked Exhibit "5", said check being drawn in the amount of \$68.23, being the amount of \$68.40 less one-quarter of one per cent discount, which check was drawn upon a joint account or deposit in the First National Bank of Anniston, Alabama, and which check upon presentation was paid in due course.

(h) That thereafter on March 5, 1941, the contractor aforesaid submitted its voucher number 565, a true and correct copy of which is attached hereto, marked Exhibit "8", and made a part hereof, to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for its expenditures aggregating \$1,991.62, and including its expenditure of \$68.23 [fol. 50] made to the Appellant as aforesaid in and about the purchase of materials hereinabove mentioned, but which voucher did not include any amount for Alabama sales tax thereon or with respect thereto, no such tax having been paid by the contractor or by the Appellant.

(i) That thereafter the Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved said voucher for payment, and on February 5, 1941, said voucher number 565, of which Exhibit "8" is a true and correct copy, was paid by the Finance Office at Fort McClellan to said contractor by United States Government check dated February 5, 1941, being check number 26948 and for the sum of \$1991.62, payable to said contractor, which said check was in payment of voucher number 565, above mentioned.

(j) That in submitting for payment voucher number 565 above mentioned, which included request for reimbursement for the contractor's payment to the Appellant as aforesaid, the contractor supported its voucher by attaching thereto its request made to the Constructing Quartermaster for approval of said purchase, bearing the approval of said Constructing Quartermaster for said purchase, a true and correct copy of which is hereto attached as Exhibit "2", copies of its purchase order to the Appellant, a copy of which is hereto attached as Exhibit "3", the two receiving and inspection reports, copies of which are hereto attached as Exhibits "4" and "4A", and said invoice of the Appellant, a copy of which is attached hereto as Exhibit "5".

6. It is further stipulated and agreed that all of the Appellant's sales of tangible personal property which are involved here were made by it in connection with the performance by the contractor of its contract with the United States hereinabove referred to, a copy of which contract is hereto attached, marked Exhibit "1", and made a part hereof, and that such property was sold, paid for and reimbursement made therefor in the manner above stated.

7. It is farther stipulated that in the performance of said contract between the contractor and the United States, in some instances, not involved in the assessment hereinabove mentioned, competitive bids for material required for the performance of said contract were called for by the Quartermaster General of the United States with respect to various materials to be used in such performance, and after the acceptance of one of the bids received in response to said call, the Quartermaster General informed the Constructing Quartermaster and the contractor of such acceptance, and requested or directed the contractor above [fol. 51] mentioned to purchase said materials from said competitive bidder for and in connection with the performance of the contractor's said contract with the United States hereinabove mentioned, which purchase was thereafter handled in the same manner as if said bid has been originally submitted to said contractor, and said materials were paid for by said contractor and bills for reimbursement therefor were submitted, approved and paid to said contractor in the same manner as in the case of the typical transaction hereinabove mentioned and described in detail.

8. That said Fort McClellan is located upon and constitutes an area situated in Calhoun County in the State of Alabama. That in the year 1918, the lands comprising such area now known as Fort McClellan were acquired by the United States of America by purchase from the individual owners of such lands, and that the deeds thereto from such owners were duly executed and delivered to the United States in the year 1918, which deeds conveyed or purported to convey therein a fee simple title to said lands; and that since such acquisition thereof the United States has continuously used such area as a military reservation or fort; and that all of the buildings and improvements mentioned in said contract executed under date of September 9, 1940, were constructed or required to be constructed upon such

area known and hereinafter referred to as Fort McClellan (not including the acquisitions of the United States subsequent to November 18, 1940, for maneuver purposes, which additional areas are not involved herein).

9. It is further stipulated and agreed that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that said Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer, in all matters pertaining to the contract mentioned in paragraph 2, a true and correct copy of which is hereto attached, marked Exhibit "1", and made a part hereof.

10. It is further stipulated and agreed that Appellant has billed the partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes or for a sum equal to the amount of the taxes assessed against Appellant as aforesaid in paragraph 4 hereof, but which have not been paid.

Fred L. Blackmon, Knox, Liles, Jones & Blackman, Attorneys for the Appellant. Thomas S. Lawson, Attorney General of the State of Alabama. John [fol. 52] W. Lapsley, Assistant Attorney General of the State of Alabama. J. Edward Thornton, Assistant Attorney General of the State of Alabama, Attorneys for the Appellee.

[File endorsement omitted.]

[fol. 53] EXHIBIT "1" TO AGREED STATEMENT OF FACTS

United States of America, War Department

Washington, May 13, 1941.

I hereby certify that I am the custodian of the files of the office of the Quartermaster General, War Department, and that the attached Contract No. W 6119 qm-161, dated September 9, 1940, with Dunn Construction Company, Inc., and John S. Hodgson and Company for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto, is a

true copy of the contract in my custody in the Office of The Quartermaster General.

Agnes N. Kilmartin, Principal Clerk Mail & Records Branch, Office of The Quartermaster General.

I hereby certify that Agnes N. Kilmartin, who signed the foregoing certificate, is the Custodian of the files of the Office of the Quartermaster General, War Department, and that to her certification as such full faith and credit are and ought to be given.

In Testimony Whereof, I Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of May, 1941.

Henry L. Stimson, Secretary of War (Seal), by
F. M. Hoadley, Assistant Chief Clerk.

[foi. 54]

Contract No. W 6119 qm-161
O. I. No. 70-41

Cost-Plus-A-Fixed-Fee Construction Contract

War Department

Contractor Dunn Construction Company, Inc., and John S. Hodgson and Company, Birmingham, Alabama.

Fixed-Fee, \$125,865.00.

Contract for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto.

Place Fort McClellan, Alabama.

Estimated cost of project, \$3,204,588.00.

Payments to be made by Finance Officer at Fort McClellan, Alabama.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

QM 8047 P3-3211 A 0002.003-02

(S.) M. B. Birdseye, Major, QMC.

This contract is authorized by the following laws:

Public No. 611—76th Congress, approved June 13, 1940.

Public No. 703—76th Congress, approved July 2, 1940.

This Contract, entered into this 9th day of September, 1940 by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Dunn Construction Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and John S. Hodgson and Company a partnership consisting of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham in the State of Alabama, hereinafter called the Contractor, witnesseth that:

Whereas, the Government desires to have constructed a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at Fort McClellan, Alabama.

Whereas, the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-[fol. 55] plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, the parties hereto do mutually agree as follows:

Article I—Statement of work.

1. The Contractor shall, in the shortest possible time, furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto and comprising 76 mess halls, 4 officers' quarters, 12 administration buildings, 2 fire stations, Post Office, 1 telegraph and telephone office, 10 Post Exchanges, service club, 7 recreation buildings, 8 infirmaries, utility shop, 14 motor repair shops, 8 storehouses, 15 warehouses, 1 gasoline storage, incinerator, bakery and equipment, laundry and equipment, cold storage building, 81 lavatory buildings, stockade fence; also a hospital unit

with equipment consisting of administration building, 4 nurses' quarters, 2 officers' quarters, 3 mess halls, 6 barracks, 2 clinics, 1 Physiotherapy building, 14 wards, 3 storehouses, morgue, covered walks, service roads and heating plant; also floors, framing and screening for 3205 tents and 1 theatre tent; also the installation of general utilities consisting of electric service, railroad, roads and walks, sewer, telephone and telegraph and water; also the grading and clearing necessary for preparation of the camp site. In accordance with the drawings and specifications or instructions contained in appendix "A" hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions.

It is estimated that the total cost of the construction work covered by this contract will be approximately Three Million Two Hundred Four Thousand and Five Hundred Eighty-Eight Dollars (\$3,204,588.00), exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government within one and one-half ($1\frac{1}{2}$) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of The [fol. 56] Quartermaster General of the Army.

In consideration for his undertaking under this contract the Contractor shall receive the following:

(a) Reimbursement for expenditures as provided in Article II.

(b) Rental for Contractor's equipment as provided in Article II.

(c) A fixed fee in the amount of One Hundred Twenty Eight Thousand Eight Hundred Sixty-Five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses.

2. The Contracting Officer, may at any time, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue and addi-

tional instructions, require additional work, or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance an equitable adjustment of the amount of the fixed fee to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and, with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article XV hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

[fol. 57] 4. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

5. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted sample has been approved by the Contracting Officer.

Article II—Cost of the Work

Reimbursement for Contractor's Expenditures

1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the Contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clamshell or other buckets, electric motors, electric drills, electric hammers, electric hoists, mechanical shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment exceeding \$300 in value as may be necessary for the proper and economical prosecution of the work. Each contract for the rental of construction plant or parts thereof by the Contractor from third parties shall be in a form prescribed by the Secretary of War, shall be subject to approval by the Contracting Officer, and shall contain the same provisions entitling the Government to acquire title to such plant or any part thereof upon the same conditions as those contained in paragraph 2 of Article II of this contract.

(d) Loading and unloading at the site of the work of construction plant, owned or rented by the Contractor; the [fol. 58] transportation thereof place or places where it is to be used in connection with said work, and return transportation f. o. b. cars to the point of original shipment or equivalent mileage, except as hereinafter set forth; the installation and dismantling thereof, and such repairs and spare parts as are not included in the rental; provided such repairs or spare parts are not made necessary by defects

in such plant, or parts thereof, or by the fault or negligence of the Contractor or his employees; but charges for transportation of such construction plant over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance.

(e) Transportation charges on materials and supplies.

(f) Transportation and traveling expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work; expenses of procuring labor and expediting the production and transportation of material and equipment. Expenditures under these items must have the written authorization of the Contracting Officer in advance.

(g) Salaries of resident engineers, superintendents, time-keepers, foremen, and other field employees of the Contractor in connection with the work. In case the full time of any field employee of the Contractor is not applied to the work his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's field organization, or as principal assistant to any such person, until there has been submitted to and approved by the Contracting Officer a statement of the qualifications and experience of the person proposed for such assignment. The regular salary or compensation rate of any such person shall not be in excess of the highest salary or compensation rate received by him during the year preceding the date of this contract plus such increase as the Contracting Officer may approve.

(h) Temporary rights in land required in connection with the work.

(i) Buildings and equipment required for necessary field offices, commissary, hospital and other facilities and the cost of maintaining and operating said offices, hospital and other facilities, including minor expenses such as telegrams, telephone service, expressage, and postage. The cost of maintaining commissary buildings and utility service therein will be reimbursed but the cost of all commissary operating [fol. 59] personnel and supplies will be borne by the Con-

tractor. All commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Contracting Officer may prescribe.

(j) Premiums on such bonds and insurance policies as the Contracting Officer may require for the protection of the Government; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary, and other insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(k) Losses and expenses, not compensated by insurance or otherwise (including settlement made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable.

(l) The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor.

(n) Such portion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the Contractor as is actually incurred in connection with this work. Expenditures under this item must have the written authorization of the Contracting Officer in advance.

(o) When specifically approved in advance by the Chief of Branch, a reasonable allowance for work done in the Contractor's general offices exclusively for and directly chargeable to the work.

(p) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When

such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

(q) It is agreed that, unless otherwise authorized by the [fol. 60] Contracting Officer, all allowances as items of cost on account of the work under this contract for travel expenses and subsistence provided for herein shall conform to the allowances authorized by the "Standardized Government Travel Regulations."

Rental for Contractor's Equipment

2. Rental shall be paid to the Contractor for such construction plant or parts thereof as he may own and furnish, at not to exceed the rates approved by the Contracting officer. Except as specified below, such rental shall begin on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment to the site of the work, as evidenced by the bill of lading covering such shipment, and shall terminate, unless title thereto passes to the Government at an earlier date, on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment from the site of the work, as evidenced by the bill of lading covering such shipment, provided such plant, or parts hereof, are so delivered without delay after notice by the Contracting Officer to the Contractor that such plant or parts thereof, are no longer required; otherwise, the rental shall terminate on the date of such notice. If such plant, or any part thereof, is not in sound and workable condition when it arrives at the site of the work, the rental period therefor shall not begin until such plant, or parts thereof, shall have been placed in sound and workable condition at the expense of the Contractor and no rental therefor shall be paid for any prior period. If such plant, or parts thereof, cannot be placed in sound and workable condition, no transportation charges for the shipment thereof shall be included in the cost of the work or paid, either directly or indirectly, by the Government. Determination as to whether such plant, or parts thereof, are in sound and workable condition shall, in every instance, be made by the Contracting Officer. Slight delays in the use of such plant, or parts thereof, caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the

use of such plant, or parts thereof, caused by other than necessary minor or filed repairs. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final unless the Contracting Officer shall, within 10 days after the machinery has been set up and working, modify or change such valuation. When and if the total [fol. 61] rental paid to the Contractor for any such part shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, no further rental therefor shall be paid to the Contractor, and title thereto shall vest in the Government. At the completion of the work or upon termination of the contract as provided in article VI, the Government may at its option purchase any part of such construction plant by paying to the Contractor the difference between the valuation of such part or parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rentals theretofore paid for such part or parts.

General

3. The Government reserves the right to furnish any materials, construction equipment, machinery, or tools necessary for the completion of the work.

4. The Government reserves the right to pay directly to common carriers any or all freight charges on construction plant, materials, and supplies.

5. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. Rates of rental as substitutes for scheduled rental rates may be agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with similar rates of rental charged in the particular territory in which the work covered by this contract is to be performed. Such substitute rates shall be subject to the approval of the Chief of Branch, but shall be followed until so approved, at which time any necessary adjustments in prior payments will be made.

7. No salaries of the Contractor's executive officers, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in section 1 of this article, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

8. The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits he shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and [fol. 62] materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

9. All revenue from the operations of the hospital or other facilities, except commissaries, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

Article III—Payments

Reimbursement for Cost

1. The Government will currently reimburse the Contractor for expenditures made in accordance with article II upon certification to and verification by the Contracting Officer of the original signed pay roll for labor, the original paid invoices for materials, or other original papers. Generally, reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

Rental for Contractor's Equipment

2. Rental as provided in article II for such construction plant or parts thereof as the Contractor may own and furnish shall be paid monthly upon presentation of proper vouchers.

Payment of the Fixed-Fee

3. The fixed-fee prescribed in article I shall be compensation in full for the services of the Contractor, including profit and all general overhead expenses. Ninety per cent (90%) of said fixed-fee shall be paid as it accrues, in monthly installments based upon the percentage of the completion of the work as determined from estimates made and approved by the Contracting Officer. Upon completion of the work and its final acceptance, any unpaid balance of the fee shall be paid to the Contractor. If the contract is terminated for the convenience of the Government, before completion, the Contractor will be paid that proportion of the prescribed fee which the work actually completed bears to the entire project, less fee payments previously made. If the contract is terminated due to the fault of the Contractor, no additional payments on account of the fee will be made.

[fol. 63] Payment by Contractor

4. If bills for purchase of material, machinery or equipment or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor hereunder are not promptly paid by the Contractor or subcontractor as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor any amount equivalent to the amount of any such bill or pay roll. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly, in such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

Final Payment

5. Upon completion of the work and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Article II hereof, and of the fee, less any sum that may be necessary to settle any unsettled claims for labor or material, or any claim the Government may have against the Contractor. The Contracting Officer

shall accept the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Article IV—Records and accounts—Inspection and audit

1. The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual cost to him of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the [fol. 64] Contractor shall preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article V—Special requirements.

1. The contractor hereby agrees that he will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such amounts and for such periods of time as the Contracting Officer may approve or require.

(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State,

Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of \$500 shall be made or placed without the prior approval of the Contracting Officer.

(d) Enter into no subcontract for any portion of the work, except in the form prescribed by the Secretary of War, nor without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly in or in part at the site of the work, or some part of the work described in Article I hereof.

(e) At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give.

(f) The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or [fol. 65] otherwise objectionable.

(g) At all times use his best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article VI—Termination of contract by Government.

1. Should the Contractor at anytime refuse, neglect, or fail to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. Such termination

shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate work under all subcontracts insofar as such orders and/or work are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of all materials, tools, equipment, and appliances and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

[fol. 66] (b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article II and not previously reimbursed.

(c) If this contract is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting services in connection with the settlement of this contract as the Contracting Officer may approve.

(d) The Government shall pay to the Contractor any unpaid balance for the rental of the Contractor's equipment in accordance with Article II to the date of termination, and if any of the Contractor's equipment is retained by the Government under the provisions of this article, additional compensation therefor shall be paid in accordance with Article II, either by purchase or rental at the election of the Contracting Officer.

(e) The obligation of the Government to make any of the payments required by this article, or by paragraph 3, Article III of this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor.

Article VII—Preference for domestic articles.

1. In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such manufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be expected by the head of the department under the proviso of title III, section 3, of the Act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, section 10b).

2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced, or manufactured, as the case may be, in the United States [fol. 67] in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos, balsa wood, China wood oil (Tung oil), chromium, cork, jute, kaurigum, lac, nickel, nickel alloy, (Monel metal), platinum, rubber, silk, sisal, teak wood, tin.

Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten, or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials, or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States.

Article VIII—Convict labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article IX—Rates of wages—Nonrebate.

1. In accordance with the act of August 30, 1935 (49 Stat. 1011; 40 U. S. C. 276a and 276a-1), the following provision shall apply:

(a) The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those established by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor [fol. 68] or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the

contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

2. Should the Contractor or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included as established for the work by the Secretary of Labor, such increased wage shall be at the expense of the Contractor and shall not be reimbursed by the United States. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's pay rolls, prior to reimbursement as contemplated in paragraph 1, of article II hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates, established for such laborers and/or mechanics, the reimbursement made to the Contractor on account of such pay rolls will not include such excess payments. The provisions of this section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor.

3. The Contractor shall furnish to the Government representative in charge at the site of the work covered by this contract or if no Government representative is in charge at the site, shall mail to the Federal agency having control of the project, within 7 days after the payment of each and every weekly pay roll, an affidavit, in the form prescribed by regulations issued jointly by the Secretary of the Treasury and the Secretary of the Interior under date of January 8, 1935, or any modification thereof pursuant to the act of June 13, 1934 (48 Stat. 948; 40 U. S. C. 276b and 276c), sworn to by the officer or employee of the Contractor supervising such payment to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates, or deductions from any wages due such employee or employees not required by law have been made either directly or indirectly, and that to the best of

the knowledge and belief of the affiant no agreement or [fol. 69] understanding exists with any person employed on the project pursuant to which any person, directly or indirectly, by force, intimidation, threat, or otherwise, induces or receives any deductions or rebates in any manner whatever from any sum paid or to be paid any person for labor performed in carrying out this contract. At the time upon which the first affidavit with respect to wages said employees is filed the Contractor shall also furnish an affidavit executed by its president or a vice president, setting forth the name of the officer or employee who supervises the payment of employees and stating that such officer or employee is in a position to have full knowledge of the facts set forth in the affidavit respecting the payment of wages of employees. A similar affidavit shall be filed immediately in the event that a change is made in the officer or employee who supervises the payment of employees. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

Article X—Workmen's compensation laws.

The act of June 25, 1936 (49 Stat. 1938, 1939; 40 U. S. C. 290), provides that the several States have authority to make their workmen's compensation laws applicable to contracts for the construction, alteration, or repair of a public building or public work of the United States, and the several States are vested with the power and authority to enforce such State laws on lands of the United States.

Article XI—Accident prevention.

The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, local, State, and municipal safety laws and building construction codes.

Article XII—Officials not to benefit.

No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article XIII--Approval required.

This contract shall be subject to the written approval of The Secretary of War and shall not be binding until so approved.

Article XIV—Covenant against contingent fees.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement [fol. 70] for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article XV—Disputes.

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch, concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is \$15,000 or less. When the amount involved is more than \$15,000, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article XVI—Contractor's organization and methods.

Upon the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part-time service in connection with the work under contract, together with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction

of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part-time service outside of the central-office organization, together with a written statement of the duties and rates of pay of each person and the procedure proposed to be allowed by the Contractor for the accomplishment of all field work, including temporary requirement; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation and [fol. 71] similar essential activities and methods.

Article XVII—Definitions.

1. The term "Chief of Branch" refers to the head of a branch or bureau of the War Department, viz., the Quartermaster General, the Chief of Engineers, etc.

2. The term "his duly authorized representative" shall mean any person authorized by the Secretary of War or a chief of branch, as the case may be, to act for him, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

Article XVIII—Alterations.

The following changes were made in this contract before it was signed by the parties hereto;

Changes are set forth in Appendix "B", attached hereto and made a part hereof.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by (s.) C. D. Hartman, Brig. Gen., QMC., Contracting Officer. Dunn Construction Company, Inc. (Contractor), by (s.) W. R. J. Dunn (Seal) and W. R. J. Dunn, President. John S. Hodgson and Company (Contractor), by John S. Hodgson, Partner, both of Birmingham, Alabama.

Approved September 12, 1940, by direction of the Secretary of War.

(s.) Robert P. Patterson, The Assistant Secretary of War.

Approved: September 10, 1940.

(s.) E. B. Gregory, Major General, The Quartermaster General.

Two Witnesses:-

(s.) Mary L. Biinte, 1325 Emerson St., N. E., Washington, D. C. (s.) O. P. Easterwood, Jr., 4200 Fourth St. North, Arlington, Va.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, W. R. J. Dunn, who signed this contract for the Dunn Construction Company, Inc., had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(s.) C. D. Hartman, Brig. Gen., QMC. (contracting officer).

[fol. 72] Directions for Preparation of Contract

1. This form shall be used when authorized by the Secretary of War for formal contracts for the construction, alteration, or repair of buildings or works accomplished under the provisions of the law specifically authorizing the use of a cost-plus-a-fixed-fee contract.

2. There shall be no deviation from this approved contract form, except as provided for in these directions without approval of the Secretary of War or his duly authorized representative. Where interlineation, deletions, additions or alterations are authorized, specific notations of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations".

3. All blank spaces on the title page must be filled in including a citation of the act or acts authorizing the contract. The Contracting Officer or his duly authorized

representative will sign the certificate of availability of funds appearing on the title page.

4. The blank space in the preamble is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

5. The blank spaces in articles I and XIII must be filled in with the data indicated therein. The contract must be dated, and the performance and payment bonds, if required, must bear the same date.

6. Each appendix will contain a sufficiently descriptive statement to identify it with the contract viz:

Appendix "A"

to Contract No. —, dated —, between The United States of America and —, for the construction of —.

7. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the Contractor's number will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

8. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, [fol. 73] amount of bond if required, as well as other administrative details, shall be as directed, by the Chief of Branch to which the contract pertains.

9. An Officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the Contractor.

10. If the Contractor is a corporation, one of the certificates following the signature of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or

the second certificate executed by the Contracting Officer. In lieu of either of the aforementioned certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the Contractor must be inserted and the contractor signed with his usual signature. Typewrite or print name under all signatures to contract or bonds.

12. Any provisions respecting labor or materials required by law to be included in this contract and any additional contract provisions deemed necessary for the particular work shall be made the subject of one or more additional articles or included in the specifications, appendix "A".

[fol. 74] STATE OF ALABAMA,

Jefferson County:

I, the undersigned, I. S. Hoffpauir, as secretary of the Dunn Construction Company, Inc., hereby certify that the following is an exact extract from the by-laws of said corporation:

"The President shall be the chief executive officer of the company, he shall preside at all meetings of the Directors and of the Stockholders; he shall have general and active management of the business of the company; shall see that all orders and resolutions of the Board of Directors are carried into effect; shall make and execute all contracts for or pertaining to construction work of any and every kind, without formal approval of the Directors, express authority to so make and execute such contracts being hereby conferred upon him, together with right to affix company seal thereto; shall execute all contracts and agreements otherwise authorized by the Board."

I further certify that W. R. J. Dunn is at this time and has been for many years President of the Dunn Construction Company, Inc.

(S.) I. S. Hoffpauir, Secretary. (Seal.)

Subscribed and sworn to before me this the 9 day of September, 1940. (S.) Jessica Ingram, Notary Public. Term expires Dec. 19, 1942. (Seal.)

Appendix "B"

To Contract No. W 6119 qm-161, dated September 9, 1940, between The United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company.

1. The following changes were made in the aforementioned contract before it was signed:

a. In Article II, Section 1 (c) lines 1, 2, and 3 the words "mentioned in the schedule of rental rates in Appendix "B", hereto attached and made a part hereof, except as hereinafter set forth", were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

b. In Article II, Section 1 (d), the following phrase was inserted in line 1 between the words "unloading" and "of": "at the site of the work". There was also inserted in line 3 of said Article and Section between the words "work" [fol. 75] and "except" the phrase: "and return transportation f.o.b. cars to the point of original shipment or equivalent mileage".

c. In Article II, Section 2, lines 2 and 3, the words "mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth" were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

d. In Article IX, Section 2, the following sentence was added at the end thereof: "The provisions of this section shall not apply, when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor."

End of Appendix "B"

40/1392.

War Department, O. Q. M. C.

Change Order A

Authorization and approval of Wage Rates in Excess of Those Predetermined by the Secretary of Labor

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartman, Brigadier General,

Quartermaster Corps, as Contracting Officer, and Dunn Construction Company, Inc., and John S. Hodgson & Co., Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto, at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and sub-contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below.

Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification	Rate
Asbestos Workers	\$1.25 per hr.
Asbestos Workers Helpers	.62 $\frac{1}{2}$ " "
Bricklayers	1.25 " "
Bricklayers Helpers	.50 " "
[fol. 76] Plumbers	1.25 per hr.
Plumbers apprentices	.62 $\frac{1}{2}$ " "
Rodmen	1.25 " "
Roofers, Composition	1.00 " "
Roofers Composition Kettlemen	.50 " "
Roofers, Composition Apprentices	.50 " "
Roofers, Slate & Title	1.25 " "
Sheet metal workers, Helpers	.50 " "
Structural Iron Works	1.50 " "
Common Laborers	.40 " "
Builders Laborers	.50 " "
Marble Masons, Slate & Structural Glass Workers	1.25 " "
Mosaic Terazo Workers	1.25 " "
Mosaic Terazo Workers	.60 " "
Sprinkler Fitters	1.25 " "
Sprinkler Fitters Helpers	.50 " "
Steam Fitters	1.25 " "
Steam Fitters Helpers	.62 $\frac{1}{2}$ " "
Stone Cutters	1.25 " "
Stone Masons	1.25 " "
Stone Masons helpers	.50 " "

Classification	Rate	
Tile Layers	1.25	per hr.
Tile Layers helpers	.50	" "
Waterproofers	1.25	" "
Watchmen	.40	" "
Waterboys	.40	" "
Painters & Decorators	1.00	" "
Plasterers	1.25	" "
Plasterers helpers & laborers	.50	" "
Carpenters	1.00	" "
Cement Finishers	1.25	" "
Electricians	1.25	" "
Electrician, Apprentices	.62½	" "
Elevator Constructors	1.50	" "
Glasiers	1.00	" "
Hodcarriers	.50	" "
Sheet Metal Workers	1.25	" "
Ornamental Iron Workers	1.50	" "
[fol. 77] Rodlayers, Reinforced	1.25	per hr.
Structural Iron Workers, Apprentices	.93	" "
Concrete Laborers	.40	" "
Lathers, Metal	1.00	" "
Lathers, Wood	1.00	" "
Marble Masons, Slate & Structural Glass		
Workers, helpers	.62½	" "
Operators of Powered Equipment:	1.37½	" "
Operators of two-drum equipment		
Operators of Heavy Duty Machines of over one yard capacity	1.50	" "
All other operators of powered equipment	1.25	" "
Oilers and Firemen	.75	" "
Mechanics for Complex Equipment	1.50	" "

By direction of the Contracting Officer. (S.) E. E.
Kirkpatrick, Capt. Q. M. C.

Date, September 30, 1940.

Authenticated Copies:

1 to C. Q. M.

1 To Disbursing Officer

1 To Contracting Officer

1 To Legal Section

1 To Fixed Fee Section

1 To Adm. Sec. O. Q. M. G. (Lab. Rel.)

Executed numbers:

1 To C. Q. M. for contractor

2 To Legal Section

(See AR 5—200, par. 15 & 19)

War Department, O. Q. M. G.

Change Order B**Authorization and approval of Wage Rates in Excess of
Those Predetermined by the Secretary of Labor**

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartmen, Brigadier General, Quartermaster Corps, as Contracting Officer, and Dunn Construction Co., Inc., and John S. Hodgson & Company, Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and Sub-Contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below.

[fol. 78] Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification	Rate		
Asbestos workers	\$1.25	per	hr.
Asbestos workers Helpers	.62½	"	"
Blacksmiths	1.00	"	"
Asphalt rakers, tampers and smoothers	.60	"	"
Bricklayers	1.25	"	"
Carpenters, journeymen	1.00	"	"
Carpenters, apprentices: 1st year	.60	"	"
2nd year	.70	"	"
3rd year	.80	"	"
4th year	.90	"	"
Cement finishers	1.25	"	"
Electricians	1.25	"	"

Classification	Rate		
Steam fitters helpers	.62 $\frac{1}{2}$	"	"
Structural-iron workers	1.50	"	"
Trackmen	.50	"	"
Truck drivers	.50	"	"
Well drillers	1.00	"	"
Well drillers helpers	.75	"	"
Boilermakers	1.00	"	"

Date November 7, 1940. By direction of the Contracting Officer.

(S.) E. E. Kirkpatrick, Capt. Q. M. C.

Authenticated copies:

- 1 To C. Q. M.
- 1 To Disbursing Officer.
- 1 To Contracting Officer.
- 1 To Legal Section.
- 1 To Fixed Fee Section.
- 1 To Adm. Sec. O. Q. M. G. (Lab. Rel.).

Executed numbers:

- 1 To C. Q. M. for contractor.
 - 2 To Legal Section. (See Ar. 5—200, par. 15 & 19).
- Filed in office May 16, 1941.

[fol. 80] EXHIBIT "2" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc.

and

John S. Hodgson & Company

Request No. 3618

Request for Purchase

Date 1-16-41

To: Purchasing Agent.

It is requested that the following be purchased for use as indicated:

Approved.....

Signed Thos. G. Walmsley
Title By: W. A. Morgan

Item No.	Quantity	Unit	Article (Complete Description)	Purchase No.	Bids Received		
					1 Price	2 Price	3 Price
1	8	Pcs.	4"x10"—16' #1 dense Pine Lumber 427 BF	1-3211			
2	4	"	" " 14' #1 dense Pine Lumber 186				
3	1	"	" " 12' #1 dense Pine Lumber 40				
4	2	"	" " 10' #1 dense Pine Lumber 67				
5	2	"	4"x12"—24 #1 dense Pine Lumber 192				
6	3	"	" " —18 #1 dense Pine Lumber 216				
7	2	"	" " 16 #1 dense Pine Lumber 128				
8	2	"	" " 14 #1 dense Pine Lumber 112				

1368 BF

Items 1 thru 4 dressed 3-5/8"x9"

Items 5 thru 8 dressed 3-5/8"x11 1/2"

Certified a true copy

1.368 MBF @ \$50.00

\$68.40

Thomas H. Doyle, Captain, QMC

Deliver to Cold Storage Plant
For Trolley System

Confirmation

1/4 of 1%—10 days

Bidders

Name	Address	How Taken	Awarded Item Nos.	Bid No.
King & Boozer	Anniston, Alabama			

Approved for purchase

(s) Thomas H. Doyle, Capt. Q.M.C.
Constructing QuartermasterFor: S. C. MacIntire, Jr.,
Major, Q.M.C.All
Issue purchase orders as
indicated above.(s) Raymond P. Reeves,
Purchasing Agent

[fol. 81] EXHIBIT "3" TO AGREED STATEMENT OF FACTS

DUNN CONSTRUCTION CO., INC.
and
JOHN S. HODGSON & COMPANY
Contractors

Fort McClellan, Ala.

Purchase Order No. 2565

Req. No. 3618. This Number Must Appear on all Invoices.

Date January 17, 1941.

To King & Boozer
Address

Please enter the following order in accordance with the conditions and terms of your accepted bid and/or contract dated — and in conformity with conditions and instructions on the reverse side hereof.

Quantity							Price	Amount
1	9 pcs.	4"x10"—16'	#1 Dense Pine Lumber			427 BF		
2	4 "	" —14'	" " "			186		
3	1 "	" —12'	" " "			40		
4	2 "	" —10'	" " "			67		
5	2 "	4"x12"—24'	" " "			192		
6	3 "	" —18'	" " "			216		
7	2 "	" —16'	" " "					
8	2 "	" —14'	" " "			112		
1.368 MBF							1368 BF \$50.00	68.40
Items 1 thru 4 dressed 3-5/8"x9"							Total	\$68.40
Items 5 thru 8 dressed 3-5/8"x12"								

Certified a True Copy. Thomas H. Doyle, Captain QMC

Ship To: United States Construction Quartermaster
At: Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co.

Ship by Best Way Via—F.O.B. Fort McClellan, Alabama.
Terms: Net—Days, Less ¼ of 1% Days. Shipments Must
Start by — And be completed by —? Mark Packages, Cases,
Etc. with above purchase order Number, Special Number

of each package, weight of each package, vendor's name, and the following special markings —

Important: See reverse side of this sheet

Dunn Construction Co., Inc., and John S. Hodgson
& Co. (S.) Raymond P. Reeves, Purchasing Agent.

(Reverse side of above sheet)

This order is placed for the benefit of, and is assignable to, the United States Government.

This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

Terms of Payment: as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills [fol. 82] of Lading (or shipping papers) and receipt of certified invoice.

The following Instructions must be followed Explicitly:

1. Acknowledge receipt of This Purchase Order. Unless acknowledged immediately we reserve the right to cancel.

2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala:

A. Original and Two (2) copies of Bill of Lading (or shipping papers).

Bills of Lading, etc., must read:

United States Construction Quartermaster at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company.

and must also bear Purchase Order Number.

B. Six (6) copies of invoice, properly filled and certified as follows:

I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured

tured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials, or supplies have been manufactures in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

3. Render Separate invoices for Each and Every shipment.

4. Make No Changes in filling this Purchase Order as to quantities, descriptions, prices, f. o. b. points, etc., except upon direct authority from our Purchasing Department.

5. Immediately upon shipping mail to the contractor 3 copies of tally and shipping memo; enclose tally or shipping memo in each package, or tack same inside each car door.

6. Mark Vendor's name and Purchase Order Number on all tallies or memos.

Full Compliance With the Above Will Expedite Payment

[fol. 93] EXHIBIT "4" TO AGREED STATEMENT OF FACTS

Receiving and Inspection Report.

Date received 1-16 194— Via Truck
Vendor King-Boozer Shipped From Anniston, Alabama.
CRR No. 03872

Articles Inspected, Accepted and Received.

Location	Quantity	Unit	Description	Talley Space
	8	Pcs.	4x10—16' Net 3-5/8x9 D4S	
	4	"	" 14' " " "	
	1	"	" 12' " " "	
	2	"	" 10' " " "	

Certified a true copy
Thomas H. Doyle, Captain, QMC

Received by /s/ E. C. Overton
/s/ J. F. Thompson

P. O. No. 2565 Date 1-17 1941 Checked by H
Invoice No. 6670 " 1-17 1941 " " H

EXHIBIT "4A" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc., and John S. Hodgson & Co.
Receiving and Inspection Report.

Date received 1-16-41

Vendor—King-Boozer

Shipped from Anniston, Ala.

Delivered To. (A) Area Site Cold Storage

Articles Inspected, Accepted and Received.

Location	Quantity	Unit	Description	Talley Space
	8	Pcs.	4x10—16	D4S
	4	"	4x10—14	"
	1	"	4x10—12	"
	2	"	4x10—10	"

Certified a true copy

Thomas H. Doyle, Captain, QMC

Received By /s/ E. C. Overton

Inspected by /s/ J. F. Thompson

P. O. No. 1663

[fol. 84] EXHIBIT "5" TO AGREED STATEMENT OF FACTS

Original

King & Boozer,
Anniston, Alabama

Invoice No. 6670

Entered Page 47

By Line 16

L

Customers Ordo No. 2565

Invoice No. 446

Requisition No. 3618

Invoice Date—Jan. 17, 1940

Sold to—U. S. Construction Quartermaster.

U. S. Army.

% Dunn Constr. Company.

& John S. Hodgson & Company.

Fort McClellan, Alabama.

Ship to and

Destination—Same as per tickets attached.

Quantity	Items	Weight	Price	Amount
8 pcs.	4x10—16' #1 Dense Pine Lumber	427'		
4 pcs.	" —14 " " " "	186		
1 pc	" —12 " " " "	40		
2 pcs	" —10 " " " "	67		
2 pcs	4x12—24 " " " "	192		
3 pcs	" —18 " " " "	216		
2 pcs.	" —16 " " " "	128		
2 pcs	" —14 " " " "	112		

(Tickets : 03872—73)

1368' \$50.00 \$68.40

Less ¼ of 1% Discount .17

Net Amount Paid \$68.23

I certify that the above bill is correct and just; that payment therefor has not been received and that except as noted below or otherwise indicated herein all manufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States, substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Firm name: King & Boozer

By Y. C. King, Partner

Certified a true copy.

Thomas H. Doyle, Captain, QMC

Calculations Checked By H

P. O. No. 2565

Purpose No. 3211 Amt 68.23

QM-7612

Certified Correct

J. P. Anderson, Chief Fiscal Accountant.

[fol. 85] EXHIBIT "6" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc.

and

John S. Hodgson & Company

No. 43

Invoice Transmittal

Date January 21, 1941.

To: Constructing Quartermaster

Attention of Field Auditor

The following Invoices are submitted for approval of payment:

In-voice No.	Date	P. O. No.	QM 7612 Vendor	Amount	Date Approved
6626	1-13-41	2531	Moore-Handley Hardware Co.	24.15	Jan. 30, 1941
6627	1-13-41	2529	" " " "	12.33	Jan. 30 1941
6629	1-13-41	2530	" " " "	33.76	Jan. 30 1941
6672	1-13-41	2534	" " " "	4.37	Jan. 29 1941
6673	1-13-41	2550	" " " "	1.80	Jan. 29 1941
6674	1-13-41	2534	" " " "	4.50	Jan. 29 1941
6675	1-13-41	2549	" " " "	202.21	Jan. 30 1941
6676	1-13-41	2534	" " " "	4.25	Jan. 29 1941
6677	1-13-41	2549	" " " "	103.95	Jan. 29 1941
6678	1-15-41	2550	" " " "	18.00	Jan. 30 1941
6679	1-15-41	2549	" " " "	558.33	Jan. 29 1941
6680	1-16-41	2531	" " " "	16.10	Jan. 29 1941
5052	11-20-40	1871	Dalrymple Equipment Co.	59.30	Returned
6575	1-10-41	2503	" " " "	7.10	Jan. 30 1941
6611	1-10-41	2501	" " " "	12.64	Jan. 30 1941
6619	1-10-41	2502	" " " "	8.45	Jan. 30 1941
6612	1-10-41	2501	" " " "	327.14	Jan. 30 1941
6614	1-10-41	2503	" " " "	437.74	Jan. 30 1941
6615	1-10-41	2502	" " " "	27.00	Jan. 30 1941
6616	1-10-41	2502	" " " "	14.36	Jan. 30 1941
6617	1-10-41	2502	" " " "	225.52	Jan. 30 1941
6618	1-10-41	2503	" " " "	15.27	Jan. 30 1941
6464	12-30-40	1432	Morse Boulger Destructor Co.	5,520.00	Jan. 30 1941
6641	1-14-41	2523	Wimberly & Thomas Hardware Co.	27.30	Jan. 29 1941
6642	1-10-41	2500	The Young & VaneSupply Co.	24.34	Jan. 29 1941
6656	12- 9-40	2535	Ed. Gantt Machinery Company	8.56	Jan. 30 1941
6670	1-17-41	2565	King & Booser	68.40	Jan. 29 1941

Certified a true copy.

Thomas H. Doyle, Captain, QMC.

Entered by WJW

JLH

Total

7,766.86

Received the above Invoices

Previous Totals ac-

455,585.91

cumulated

Accumulated Totals
to Date

463,352.77

Constructing Quartermaster

Dunn Construction Co., Inc.

and

By /s/ W. H. Horton, Jr.

John S. Hodgson & Co.

Field Auditor

By /s/ J. P. Anderson

[fol. 86] EXHIBIT "7" TO AGREED STATEMENT OF FACTS

Office of
Constructing Quartermaster
Fort McClellan, Ala.

Invoices Approved.

To: Dunn Construction Co., Inc.

Date

January 29, 1941.

and
John S. Hodgson & Co.

The following Invoices are approved for payment:

Invoice No.	Date	Vendor	Original Amount	Dis- count	Approved Amount
6679	1-15-41	Moore-Handley Hardware Co.	558.33	11.17	547.16
6677	1-13-41	" " " " (Inc	103.95	2.08	101.87
6641	1-13-41	Wimberly & Thomas Hardware Co./	27.30		27.30
6642	1-10-41	The Young & Vann Supply Co.	24.34	.49	23.85
6639	1-11-41	Robert P. Stapp	67.50	1.35	66.15
6638	1-11-41	" " " "	71.00	1.42	69.58
6654	1-15-41	Stephens Printing Company	7.50	.15	7.35
6674	1-13-41	Moore-Handley Hardware Co.	4.50	.09	4.41
6676	1-13-41	Moore-Handley Hardware Co.	4.25	.08	4.17
6672	1-13-41	" " " "	4.37	.09	4.28
6680	1-16-41	" " " "	16.10	.16	15.94
6489	12-30-40	J. D. Pittman Tractor Co., Inc.	11.83		11.83
6673	1-13-41	Moore-Handley Hardware Co.	1.80	.04	1.76
6628	1-13-41	" " " "	262.62	1.31	261.31
6640	1-13-41	Robert P. Stapp	29.80	.60	29.20
6637	1-11-41	" " " "	171.50	3.43	168.07
6636	1- 8-41	" " " "	91.95	1.84	90.11
6624	12-26-40	Ed Gantt Machinery Co., Inc.	47.00		47.00
6255	12-24-40	The Young & Vann Supply Co.	37.20	.74	36.46
6128	12-16-40	Noland Company, Inc.	42.50	.85	41.65
6631	1-13-41	Moore-Handley Hardware Co.	30.00	.60	29.40
6610	1- 8-41	Barbor-Greene Co.	172.15	3.44	168.71
6646	12-14-40	Addressograph	5.25		5.25
6338	12-28-40	Moore-Handley Hardware Co.	28.80	.58	28.22
6336	12-27-40	" " " "	21.60	.43	21.17
6634	12-29-40	J. D. Pittman Tractor Co., Inc.	105.68		105.68
6635	12-29-40	J. D. Pittman Tractor Co., Inc.	1.60		1.60
5762	12-10-40	Virginia Steel Company, Inc.	300.00	1.50	298.50
6196	12-14-40	" " " "	1,991.00	9.95	1,981.05
6609	1- 6-41	Adams-McCargo Motor Company	6.19		6.19
6670	1-17-41	King & Boozer	68.40	.17	68.23
6655	1-14-41	Alabama Pipe Company	215.60	4.31	211.29
5602	12- 4-40	Noland Company, Inc.	3.30	.07	3.23
6172	12-17-40	Noland Company, Inc.	6.10	.12	5.98
6582	1-13-41	Moore-Handley Hardware Co.	27.50	.55	26.95

4,568.51 47.61

Certified a true copy

Mar. 1, 1941

Thomas H. Hoyle, Captain, QMC

Entered E. H. J.

Received the above Invoices

Totals

4,520.90

Dunn Construction Co., Inc.

Previous Totals Accumulated

426,981.29

and

Accumulated Totals to Date

431,502.19

John S. Hodgson & Co.

Constructing Quartermaster

By H. A. Gholson

By /s/ E. D. Proctor

Field Auditor

[fol. 87] EXHIBIT "8" TO AGREED STATEMENT OF FACTS

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN
PERSONAL

U. S. War Department Voucher No. 515

Voucher prepared at Fort McClellan, Ala., 2-3-41
The United States, Dr.

To Dunn Construction Co., Inc. & John S. Hodgson & Co.
Address Fort McClellan, Alabama

Articles or Services

Balance brought forward	1,991.62
Total	1,991.62

I hereby certify that the above bill is correct and just; that payment therefor has not been received; and that except as otherwise noted of all articles, materials, and supplies furnished under purchase order No. — if unmanufactured articles, materials, and supplies, have been mined or produced in the United States, and if manufactured articles, materials, and supplies, they have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Payee Dunn Construction Co., Inc. & John S. Hodgson & Co. Per /S/ E. A. Goshen, Title Chief Accountant.

Contract No. W-6119 Qm-161. Date 9-9-40.

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance and delivery prior to payment as required by law, or the services were performed as stated; that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No. — of "Method of or Absence of Advertising" shown on reverse hereof and were necessary for the

public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for \$1,991.62.

/S/ S. C. MacIntyre, Jr., Major, QMC., Constructing Quartermaster.

/S/ E. D. Procter, Field Auditor.

[fol. 88]

Accounting Classification

Appropriation, limitation, or project symbol 21X0640.063.

Limit'n or Proj't Amount 1,991.62.

Appropriation Amount 1,991.62.

Construction of Buildings, Utilities and Appurtenances at Military Posts. Emergency construction. No Year. (See Form 35-A attached).

Certified a True Copy

Thomas H. Doyle, Captain, Q.M.C.

Public Voucher for Purchases, and Services other than Personal

Continuation Sheet

U. S. War Department Sheet No. 2 of Bureau Voucher No. —.

No. and Date of order.	Articles or Services	Amount
------------------------	----------------------	--------

Our Invoice No.

5139	Robert P. Stapp	28.40
5146	Ceco Steel Products Corporation	165.07
5344	Moore-Handley Hardware Co.	8.82
5876	W. S. Darly & Co.	1.61
5964	Moore-Handley Hardware Co.	207.76
5761	Virginia Steel Company	69.65
5977	Virginia Steel Company	690.50
6179	Geo. F. Shoelock Co.	2.72
6188	The Southern Oil Equipment Com- pany	137.59
6214	W. S. Dickey Clay Mfg. Co.	32.01
6250	O. K. Tire & Radiator Shop	12.50
6495	C. S. Sawyer	192.80

No. and Date of order.	Articles or Services	Amount
Our Invoice No.		
6496	C. S. Sawyer	69.30
6556	Moore-Handley Hardware Co.	46.40
6574	W. S. Dickey Clay Mfg. Co.	14.72
6609	Adams-McCargo Motor Company	6.19
6655	Alabama Pipe Company	211.29
6670	King & Boozer	68.23

Certified & True Copy.

Thomas H. Doyle, Captain, Q.C.-Res.

[fol. 89]

Analysis of Vouchers

Appropriation Title

2LX0540.068 Construction of Buildings, Utilities and Appurtenances at Military Post. Emergency Construction.
No Year.

QM-7612	PI-3211	0540.068M	1,023.22
QM-7612	PI-3212	0540.068M	88.97
QM-7612	PI-3213	0540.068M	879.43
			<hr/>
			1,991.62

Certified a true copy.

Captain Thomas H. Doyle, Captain QC-Res.

[fol. 90] IN CIRCUIT COURT OF MONTGOMERY COUNTY

Statement of Evidence

MAJOR S. C. MACINTIRE, JR., being first duly sworn, testified as follows:

Direct Examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. S. C. MacIntire.

Q. Your age, please, sir?

A. Fifty-one.

Q. Your present residence?

A. Decatur, Georgia.

Q. Your present occupation?

A. Soldier.

Q. With what part of the Army are you connected?

A. Quartermaster Corps.

Q. How long have you been with the Quartermaster Corps?

A. Since last August.

Q. What capacity do you hold with the Quartermaster Corps?

A. You mean rank, or do you mean——

Q. (Interposing): Job.

Mr. Green: Rank and duties.

Q. Rank and duties?

A. I was assigned to Constructing Quartermaster, as a Major. This just covers this present active-duty period, see?

Q. You are Constructing Quartermaster on what job?

A. Now?

Q. Then?

A. Fort McClellan.

Q. Did you know Mr. John Hodgson?

A. Yes.

Q. Did you deal directly with him while you were Constructing Quartermaster at Fort McClellan in connection with the performance of this contract which Dunn Construction Company, Incorporated, and John S. Hodgson & Company had with the Government for the construction of a tent camp and other buildings at Fort McClellan?

A. Yes.

Q. I hand you a document marked Exhibit A and ask you if you have ever seen that document, or a copy of it, before?

A. Yes. This is the guide and instructions to Constructing Quartermasters covering fixed-fee project operation.

[fol. 91] Q. How did you come into possession of this?

A. It was forwarded to me by the Quartermaster General's office in Washington, for distribution on the job.

Q. By whom was it prepared and issued?

A. Issued by the Quartermaster General in the Construction Division. And it came to my office—those forms came to my office, I believe either five or six copies; and we

were instructed to distribute them to the contractor and to the architect-engineer, so we were all conversant with the instructions.

Q. Did you deliver one of the copies to the constructing contractors on the job at Fort McClellan?

A. Yes; to the contractors and to the engineers, both.

Q. Did you, in your capacity as Constructing Quartermaster, follow the directions and procedures which are set forth in this "Supplement to Guide for Constructing Quartermasters"?

A. I believe—

Mr. Lapsley (interposing): Your honor—

The Court: Hold just a second. What is the ground of objection?

Mr. Lapsley: We object to that question specially on the ground that it calls for incompetent, irrelevant and immaterial testimony, conclusion of the witness—

The Court (interposing): Can you out-talk that fan just a little bit?

Mr. Lapsley: Incompetent, irrelevant, immaterial, and calls for a conclusion of the witness; and, further, that it calls for evidence which is not pertinent to any issue in this case; and, another ground, that it is an attempt to alter or vary the terms of a written contract, by parol.

The Court: I will let it in and give you an exception to the Court's ruling. Now you can answer it.

Witness: Do I—

The Court: You can answer now.

Witness: Answer the question?

The Court: Yes.

A. Well, as nearly as it was possible to follow this, but the Constructing Quartermaster is given discretionary powers in certain things to make routine decisions, which I exercised in many cases.

Q. But that power of discretion that you exercised is given you in these instructions?

A. That's right. The authority is in there. I didn't have to run to Washington with every decision that I made.

[fol. 92] Q. How long did the instructions that are set forth in this Guide remain in force and effect?

A. Well, now, that leads me off on what I was trying to say: That was in effect until these came out, but I didn't

want the impression to go into the record that there were no other instructions that came out in the interim.

Q. What other instructions came out in the interim?

A. Well, it is continuous. These Construction Division letters come out continuously, probably a dozen a week or more, and they are in some cases instructions on things that have nothing to do with the manual; but, however, I didn't want you to get it in the record that stopped everything until this came out. You see, there's also zone letters that come out, that are instructions, as things develop.

Q. The instructions that you say came out from time to time were all incidental in nature?

A. Oh, yes; or they could have been on lump-sum contractors, or anything.

Q. But they did not change substantially the procedures—

A. (interposing): Not at all. Not at all, no. But you see in your original question to me you asked me apparently whether there was a gap of any kind between these two, and there was.

Q. When was the new Manual for the Construction Division, Office of the Quartermaster, with instructions to Constructing Quartermasters, issued?

A. It was issued under the date of March 19, 1941.

Mr. Mickey: I offer in evidence Exhibit A, entitled "Supplement to Guide for Constructing Quartermasters, revised 1940, covering fixed fee projects", dated August 27, 1940.

Mr. Lapsley: We wish to object to the introduction of this document.

The Court: Why don't you do this: Follow this rule: Unless you specially object—

Mr. Lapsley (interposing): I will put my grounds in.

The Court: Yes, put your grounds in, and any other grounds, if you don't assign any.

Mr. Green: It will stand on that same objection. The objection shows it relates to all of them.

The Court: Well, it is in.

Mr. Thornton: Judge, did we understand you overrule the objection?

The Court: Yes.

Q. Major MacIntire, I hand you a document marked Ex-[fol. 93] hibit B, entitled "Fixed Fee Letter No. 5", and ask you if you have ever seen that letter, or a copy of that letter, before?

A. Yes. This is a circular letter that came out to all Constructing Quartermasters.

Q. From whom?

A. From the office of the Quartermaster General, and it is signed by Captain Kirkpatrick, who was at that time an assistant in the Fixed Fee Section.

Q. This is an illustration of the type of letter which you say came out——

A. (interposing): That's correct.

Q. (continuing): —in addition to the——

A. (interposing): That's correct.

Q. (continuing): —instructions in the Guide. Approximately when did that document reach you? When did you receive a copy of that?

A. Well, it would be difficult for me to fix the date. I'm surprised that this isn't dated.

Q. Approximately?

A. Well, I would say it must have come out in October. About October of 1940.

Q. Did you receive copies of that which were transmitted by you to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in your capacity as Constructing Quartermaster?

A. I can't answer that question, because I don't know. The procedure would have been, yes. But whether that was actually delivered, I have no way of knowing. I have no receipt for them.

Q. But in the usual course of routine, you would have received copies of that——

Mr. Green: He answered that question. He said yes, he would have in normal course delivered it.

Witness: Yes.

Mr. Mickey: I offer in evidence Exhibit B.

Mr. Lapsley: You got a B on it?

The Court: Yes.

Mr. Thornton: We object to it. Reserve the right to assign grounds.

The Court: Yes. Same ruling and same exception.

Q. I show you exhibit marked Exhibit C, entitled "Construction Division Letter No. 101", dated February 19, 1941——

A. (interposing): That's correct, yes.

[fol. 94] Q. (continuing): — and ask you if that is a copy of letter you received from the office of the Quartermaster General in Washington, D. C. 5

A. That's correct.

Q. In your capacity as Constructing Quartermaster and——

A. (interposing): May I interrupt? I wasn't at Fort McClellan when this letter was received. I received this letter in Atlanta at my present assignment. You see, I reported there the 18th of February. This is the 19th of February.

Q. This is a general letter which you would have received?

A. That's right. You see, this went to all Constructing Quartermasters. You see, Captain Doyle was there when he got that. He relieved (witness stopped).

Mr. Green: Have you any questions, Mr. Lapsley?

Mr. Lapsley: No.

Witness excused.

CAPTAIN THOMAS H. DOYLE, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. Thomas H. Doyle.

Q. You are at present Constructing Quartermaster at Fort McClellan?

A. Yes.

Q. Have you ever seen a copy of this document, marked Exhibit C?

A. Yes.

Q. Have you applied the instructions and directions given to Constructing Quartermasters thereby at Fort McClellan?

Mr. Lapsley: We object to that.

Mr. Green: And to—wait; let him finish the question. and——

Q. And to Dunn Construction Company, Incorporated, and John S. Hodgson & Company?

A. Yes.

Mr. Lapsley: We object to that.

The Court: Yes. Same ruling. Same thing.

Mr. Green: Now introduce it in evidence.

[fol. 95] Mr. Mickey: I offer Exhibit C in evidence.

Mr. Green: That's all, Captain.

Mr. Thornton: And we have an exception. We object.

The Court: Yes.

Mr. Thornton: We object, with leave to assign all grounds applicable.

The Court: Oh, yes.

Witness excused.

MR. JOHN S. HODGSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. You are John S. Hodgson, aged thirty-eight, one of the partners of John S. Hodgson & Company, which is associated with Dunn Construction Company, Incorporated, as a partner, or co-venturer, in a contract dated September 9, 1940, a copy of which is attached to the petition for a declaratory judgment filed in this case?

A. Yes.

By Mr. Green:

Q. In the course of the performance by Dunn Construction Company and John S. Hodgson & Company of that contract, did you, in the behalf of the co-venture, receive, through the Constructing Quartermaster on duty at that Post, copies of the documents which I hand to you, and which are marked, respectively Exhibit A, Exhibit B, and Exhibit C?

A. Yes.

Mr. Mickey: That's all.

Mr. Green: Wait a minute. No, it is not all.

Q. Why were these documents, if you know, delivered to you by the Constructing Quartermaster?

Mr. Lapsley: We object to that.

Mr. Green: Understand that. Understand that.

Mr. Thornton: We object to that, with leave to assign grounds—is that the same agreement—

The Court: Yes. Same rule.

Mr. Thornton: All right. With leave to assign grounds. [fol. 96] The Court: Any additional grounds you want. All right. You can answer.

A. Because they pertain to the operation of this contract.

Q. Whose operation?

A. They pertain to the operation of the Constructing Quartermaster, the engineers, and the contractors.

Q. And by contractor you mean particularly to the co-venture of Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in the performance of its contract of September 9, 1940, which has been mentioned above?

A. Yes, sir.

Q. Did you apply the instructions contained in those several exhibits to your operations, in the performance of your contract?

Mr. Lapsley: We object.

The Court: Same ruling. Let it in, and you have an exception.

A. We did.

Q. I hand you what purports to be—I hand you a photostatic copy of what purports to be a conference held with the Dunn Construction Company and John S. Hodgson & Company in Room 2241, Munitions Building, Washington, D. C., on September 6, 1940, between Mr. Dunn and yourself, and Lieutenant-Colonel E. G. Thomas and Mr. Loving and Mr. O'Brien, all representing the Government, relative to the construction of Camp McClellan, Alabama, and ask you if you have ever seen—if that is a true copy of any paper which you have ever seen?

Mr. Lapsley: Now, we object to that question.

The Court: Overrule it and give you an exception. I presume it is a true copy?

A. I haven't read it in detail, but I remember the conference.

The Court: So far as you know—

Witness (interposing): In my opinion, it is a true copy.

Q. In your opinion, it is a true copy of that conference?

A. Yes, sir.

Q. You know why the conference was held?

Mr. Lapsley: We object to that.

The Court: "Know *why* the conference was held"?

Mr. Green: Yes, sir.

The Court: Overrule and let it in, and give you (Mr. Lapsley) an exception.

A. For the purpose of discussing a proposed contract for the construction of the camp at Camp McClellan.

[fol. 97] Q. And by that proposed contract, you mean a proposed contract to be entered into by Dunn Construction Company and John S. Hodgson & Company with the United States?

A. Yes, sir.

Q. Was such a contract consummated pursuant to this conference?

Mr. Lapsley: We object.

The Court: Overrule, and give you an exception.

A. It was.

Q. Is that the contract which you have seen filed in this case as an exhibit attached to the petition for a declaratory judgment, filed in your name and in the name of the United States?

A. Yes, sir.

Mr. Green: We introduce this in evidence and mark it Exhibit D.

Mr. Lapsley: And we object to the introduction of this, on like grounds, and everything—

The Court (interposing): Yes.

Cross-examination.

By Mr. Lapsley:

Q. I want to ask you, Mr. Hodgson, as nearly as you can state, when did you receive copies of the papers referred to and marked as Exhibits A, B and C?

A. During the course of construction. The first of these began coming out immediately after the job started, and the letters—at different times during pretty—at pretty regular intervals throughout construction.

Q. You mean after you had signed the contract and started to perform this work?

A. Yes, sir.

Mr. Thornton: Now, Judge, we would like to renew our objection at this time, and further make a motion to exclude, because it obviously appears that this is an effort to vary the terms of the written contract.

The Court: Same ruling, and same exception.

Mr. Green: I ask this question. I am not as familiar with Alabama practice as our friends here.

Mr. Lapsley: Same as Virginia.

Mr. Green: No. These papers appear to be copies. They are merely photostats, and not originals.

Mr. Lapsley: We make no objection as to whether they [fol. 98] are true copies.

The Court: Just consider them as being originals, if you want to.

Mr. Lapsley: Each one treated as originals.

Mr. Green: I want to make that statement, because if any point is taken on that, we submit a willingness now to submit duly authenticated copies.

The Court: No point on that.

Mr. Lapsley: No point on that. We concede they are copies.

Redirect examination.

By Mr. Mickey:

Q. I hand you a letter dated February 8th and marked Exhibit E, and ask you if you received that letter from the Constructing Quartermaster?

A. We did.

Mr. Mickey: We offer that Exhibit E in evidence.

Mr. Thornton: Is there something else here going in?

Mr. Mickey: Yes.

Mr. Lapsley: I didn't get through looking at all these exhibits.

Mr. Thornton: And we object to that.

The Court: Yes; and the same ruling.

Mr. Mickey: I will give you a copy.

Mr. Lapsley: Is that Exhibit E?

Mr. Mickey: That's right.

Mr. Lapsley: We object to this.

The Court: Yes. Same objection, same ruling.

Q. I hand you two papers, marked Exhibits F and G, which are letters dated November 12, 1940, and November 14, 1940, from the Constructing Quartermaster to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, Fort McClellan, Alabama, and ask you if you have ever seen copies of these exhibits?

A. Yes, I have seen copies.

Q. Were the instructions given by the Constructing Quartermaster therein, followed?

A. Yes.

Mr. Mickey: I offer these Exhibits F and G in evidence.

Mr. Thornton: And note our objection, please.

The Court: Yes.

Q. I hand you a letter marked Exhibit H, dated February 17th, to the Constructing Quartermaster at Fort McClellan, Alabama, from the Project Manager of Dunn Construction [fol. 99] Company, Incorporated, and John S. Hodgson & Company, and ask you if you have seen a copy of that letter?

A. I may not have seen a copy of this particular letter.

Q. I ask you if that was a copy of a letter?

A. Wait. I may not have seen this particular letter.

Q. I ask you if that was a copy of a letter send by Dunn Construction Company, Incorporated, and John S. Hodgson & Company, to the Constructing Quartermaster?

A. I don't remember the instance. I didn't handle that personally, but I presume it is. The man had authority to write for us—Mr. Stout.

Q. I hand you a letter marked Exhibit I, and ask you if that is a reply to said letter?

A. Yes, sir.

Mr. Thornton: Are you offering all those?

Mr. Lapsley: We object. Well, he has not offered them yet.

Mr. Thornton: Are you offering those in evidence?

Mr. Mickey: I am offering these two documents, Exhibits H and I.

Mr. Thornton: And we object to them. Object to each of those, separately.

Mr. Lapsley: Object to them.

The Court: Yes.
Mr. Mickey: That's all.

Witness excused.
Testimony closed.

[fol. 100]

EXHIBIT "A"

Supplement to Guide for Constructing Quartermasters,
Revised 1940, Covering Fixed Fee Projects

Office Quartermaster General

August 27, 1940.

Note:—The Matter Contained In The Following Pages Is Intended As General Information Only To Aid The Constructing Quartermasters And Their Assistants In Connection With Fixed-Fee Contracts Covering Construction Work.

40/1354.

General

The following instructions pertain to supervision of work under Fixed Fee Contracts:

1. The information contained in the Guide for C.Q.M's as revised in 1940 is, in general, applicable to construction work being performed under either a lump sum or a Fixed Fee Contract, as are the Army regulations and other War Department documents mentioned therein. The laws, this Guide, Army Regulations, and other instructions have been and will be altered from time to time and it is the responsibility of the Constructing Quartermaster to keep himself and his office informed concerning the laws and regulations under which he must operate.

2. Appended hereto is a chart showing the recent reorganization of the Construction Division O.Q.M.G.

Constructing Quartermaster

3. All Constructing Quartermasters in the field have been supplied with certain Army regulations, Federal Specifications, [fol. 101] and other pertinent circulars and instructions or will be furnished same upon request. Any special

regulations, circulars, etc. desired in addition to these should be requested by letter to this office.

4. First. In Emergency construction for defense purposes, the most important element is time of completion. Speed is Essential.

5. Second. It is the duty of all Officers to see that all money is wisely and honestly expended.

6. Third. Each Constructing Quartermaster is responsible for the satisfactory completion of the job under his direction. He is expected to exercise initiative and to appreciate that he is directly responsible to the Chief of the Construction division for his operations. The Washington Office of the Construction Division will furnish Constructing Quartermasters information as to the requirements to be met, and the Constructing Quartermaster's primary duty is to fulfill these requirements and to keep the Washington Office informed by all the regular reports and by any special reports or letters considered necessary.

7. Fourth. The Engineering Branch, O.Q.M.G., will observe and review the technical features of the work of the Engineer-Architect so far as necessary and practicable without in any way delaying the progress of construction. To that end, the Constructing Quartermaster will as rapidly as possible, submit to this office, in duplicate, sketches, preliminary drawings and other data in sufficient detail to present clearly the dimensions, materials, capacities, structural features, architectural treatment and other elements proposed to be used. If the data submitted are unsatisfactory in any material degree, the Constructing Quartermaster will be notified by telephone or geograph, and will order such revisions which are at that time practicable.

8. Fifth. A Procurement and Expediting Branch has been established in the Construction Division of the Office of the Quartermaster General to centralize the purchasing and the mobilization of materials required in construction. If it appears that the normal methods of procuring and delivering material may break down to such an extent that a project will be delayed, this office should be advised immediately giving full particulars.

Special Instructions Regarding Correspondence

9. In the following instructions "this office" refers to the Construction Division which is a division of the Office of [fol. 102] the Quartermaster General.

10. The form of address for mail shall be: The Quartermaster General, Washington, D. C.

11. All correspondence to this office relative to construction on a Fixed Fee Basis will have the words (Fixed Fee Branch) immediately following the subject; example, Subject: Test Portland Cement, Springfield Arsenal (Fixed Fee Branch Telegrams or radios should be addressed: The Quartermaster General, Washington, D. C.

12. Each telegram to be consecutively numbered at the end thereof; Number First telegram "1" with prefix C. F. for Construction Branch Fixed Fee and then the number of the telegram or radio followed by E for the engineering branch of the Constructing Quartermaster Office. Example: "The Quartermaster General, Washington, D. C. C-Eight-N E Report forwarded today. C. F. One-E, Jones."

13. Every project in the field will be assigned to a Chief of Section in this office through whom all matters relating to the project will pass.

14. Depending upon the size of the project, a number of Commissioned Assistants will be ordered to report to the Constructing Quartermaster for duty. These Officers may be utilized in positions such as Executives, Property Officers, and as the Engineering representatives, etc. of the Constructing Quartermaster on the work.

15. Where necessary and considered advisable by the Constructing Quartermaster additional civilian engineering and other personnel may be employed—in accordance with regulations after obtaining the authority of this office for their employment.

16. The Constructing Quartermaster will utilize the Engineering Contractors and the Constructing Contractors engineering and other forces to the fullest extent.

17. A Field Auditor will be assigned to duty under the Constructing Quartermaster. He will be responsible for the employment of all necessary assistants, subject to the

Constructing Quartermaster's approval, and for the faithful [fol. 103] performance of all their duties. The duties and procedure of the Field Auditor and his assistants are defined in detail below.

18. The C. Q. M. may designate any of his Commissioned Assistants as property officers. The C. Q. M. will be jointly responsible *with his* Property Officers and they will inform themselves as to their responsibility and keep all necessary accounts as provided by Army Regulations, and property accounts will be kept as described therein, for which purpose he may utilize his Auditing Staff. All regulations as to bonds will be complied with.

19. When the construction is being performed by the Construction Division for some branch of the War Department other than the Quartermaster Corps, an Officer from another branch of the War Department may be assigned as the Constructing Quartermaster or as his assistant. It must be clearly understood that the authority of the Construction Division is paramount, in all matters whatever pertaining to the work and the C. Q. M. is the representative of the Quartermaster General at the site of the work.

Duties of the Constructing Quartermaster

20. The Constructing Quartermaster should read the contracts until he has become thoroughly familiar with it, and at frequent intervals read it again. He should also insist that the contractor do the same. Many unnecessary questions and much correspondence will thereby be avoided.

21. Before making or authorizing any expenditures upon the work, the Constructing Quartermaster shall first ascertain that he is authorized by this office to do so. It will be necessary at times, to begin work before plans are completed, and on verbal instructions as to the engineering features, but the Constructing Quartermaster will see that he is furnished at the earliest moment all necessary plans, specifications, and other data, and he or his representatives will advise the contractors fully as to the character of the work and the general order and manner of prosecuting it. Any verbal instructions necessary will be confirmed in writing for the protection of the Government and the Contractors.

22. The Construction Quartermaster will be responsible for the *conduct of the work* in accordance with the plans and specifications, these instructions and such special instructions as he may receive from this office from time to time. He will not depart from such instructions or data to any important extent without the written consent of this office, but he will be expected to make such minor changes as in his judgment are clearly necessary in the interest of expedition, quality or economy, and as to which time does [fol. 104] not permit this office to be consulted in advance. He will, however, advise this office of any such changes as promptly as possible.

The Contractor

23. The selection of the contractors for a fixed fee contract implies, in general, confidence in his capacity, specific experience and the possession of an adequate working organization, plant and plan of operation. In case the Constructing Quartermaster shall become convinced that the contractor is deficient in any of these respects, it shall be his duty to remedy the deficiency by suggesting necessary changes or additions be made in the contractor's organization or methods or if the deficiency be serious, to consult this office without delay as to what steps should be taken.

24. Assuming the possession of an adequate organization and plan of operation by the contractors, it is understood that they will *conduct* the work in accordance with their *usual methods*, except so far as may be necessary to comply with the requirements of this office, and subject, always, to the Constructing Quartermaster's approval.

25. The contractors shall provide such superintendents, engineers, accountants, clerical help, timekeepers, material checkers, etc., as are needed to properly conduct the work, subject to the approval of the Constructing Quartermaster. He will be responsible for the employment of all necessary men, teams, and plant, and for the efficiency of all of his representatives, assistants, and employees. It will be his duty to promptly check all plans and specifications which may be furnished him. Schedules of materials may be furnished the contractor for his assistance in preparing his own lists, but he must always understand that his responsibility for prompt, full and accurate bills of material is in

no way modified by any such information, which is given solely in order to get delivery of materials started at the earliest moment.

26. It is the policy to contract on a Fixed Fee basis, for the services of Architects and Engineers as well as for construction work and this guide will apply to both types of contracts.

Materials and Equipment

27. In purchasing material by the contractor the purchase order must always be first approved by the Constructing Quartermaster.

28. It is expected that the contractor will already have a large portion of the plant to handle the work. When a contract is awarded, the contractor shall submit to the Constructing Quartermaster, a list of the plant needed for the [fol. 105] work. The Constructing Quartermaster shall submit this list to this office and this office will furnish from available plant already owned by the Government, such items as are on hand, and shall authorize the contractor through the Constructing Quartermaster, to furnish the balance. Such plant and material, as may be necessary and available in the local markets for conducting the early operations prior to the arrival of material ordered on regular schedule, should be located by the contractor at once, and may with approval of the Constructing Quartermaster be ordered locally. A schedule of allowable rentals will be included in each construction contract.

Funds

29. The Constructing Quartermaster should note that immediately upon acceptance of materials, they become the property of the Government under the contract. He must be prepared to reimburse the contractor promptly upon his material vouchers, to take advantage of all cash discounts. A preliminary allotment of funds to start the work will be made by this office and thereafter it shall be the duty of the Constructing Quartermaster to make the necessary request for the necessary additional funds not exceeding the amount set aside for the project in this office.

Contracts and Sub-Contracts

30. The formal contracts for this work will be executed by the Officer in charge of Construction Division. The terms and conditions under which sub-contracts can be entered into are fixed by the general contract. Forms for such sub-contracts will be furnished by this office. Sub-contracts, except for plumbing, steam heating, electrical work, and other work that can be done more economically by specialized working forces, should not be entered into unless it is found that completion of the work can be materially hastened thereby. In every case of sub-contracts, the prior approval of this office will be required. After approval of a sub-contract by this office has been sent to the Constructing Quartermaster, he shall give his written approval to the contractor, before the sub-contract is executed.

Wages

31. Wages as determined by the Secretary of Labor under the Bacon-Davis Act will as set out in contract be paid on the project unless otherwise provided by the Contract.

Terms of the Contract

32. The employees of the contractor, such as assistant superintendents, foremen, etc., shall be subject to the approval of the Constructing Quartermaster on each project.

33. The contractor shall not attempt to secure labor at the expense of other government work. See letter CQMG—File QM 230.14 CNL, dated July 25, 1940.

Guard

34. A military unit may be sent to the site for guard duty by the using service. The guard will be disposed of by the Commanding Officer of Troops as requested by the Constructing Quartermaster in accordance with the necessities as indicated by him. In cases where circumstances prevent the assignment of a military unit for guard duty, the Constructing Quartermaster will arrange for civilian proper guards. Barracks or any other suitable buildings that have been constructed may be used for housing the guard.

Hospital and Medical Services

35. The contractor must provide hospital and medical services for his forces, and must comply with sanitary regulations prescribed by the Constructing Quartermaster.

Temporary Buildings

36. Temporary buildings as needed may be constructed in accordance with appropriate mobilization or other plans by the contractor for warehousing of materials and for the housing of the Constructing Quartermasters, the Contractors, and the Finance Officer's office forces and for other purposes. Such buildings will be constructed and located in a manner making it possible for the Government to use them after they have served their purpose with the contractor.

37. Temporary housing for workmen, unless covered by the contract, will require prior approval of this office. Portions of the permanent buildings when available may be used for temporary offices by the Constructing Quartermaster. When permanent buildings are vacated, they shall be thoroughly cleansed and fumigated under the direction of a medical officer. Telephone service for Constructing Quartermasters will be secured in accordance with the provisions of Par. 13—AR 5-200.

Progress Reports

38. Progress reports, together with ideal charts and photographs, will be furnished as called for in the guide for C. Q. M.'s and by the Chiefs of Sections.

[fol. 107] Completion Reports

39. Completion reports as required by AR 30-1435 will be furnished at the completion of project by Constructing Quartermaster. The preparation of data for this report should be started with the beginning of the project.

40. Accurate and detailed records of all underground utilities will be maintained as the work progresses and will be kept up to date. Copies will be furnished the Post Quartermaster as well as this office as work is completed.

41. Whenever necessary to expedite the accomplishment of the defense program, purchasing officers may resort to

the execution of negotiated lump sum contracts or negotiated cost-plus-fixed-fee contracts only upon the specific authority of this office, and in accordance with the specific instructions of this office concerning the method of negotiation to be followed.

Auditing

42. The Field Auditor is in charge of the auditing in connection with all Government construction which is under the supervision of the Constructing Quartermaster and he reports and is responsible directly to the Constructing Quartermaster. It is his duty to aid and assist the Constructing Quartermaster in seeing that the provisions of the contract are carried out and carefully to substantiate all transactions connected with the expenditure of the Government moneys in auditing procedure.

43. Matters not specifically covered herein may be found in Q. M. C. Publications, W. D. Circulars, W. D. Procurement Circulars, Finance Circulars and Army Regulations. However, in case of doubt this office should be consulted in order to determine the proper procedure.

44. The Field Auditor should bear in mind that the contractor must be reimbursed promptly for expenditures made by him and that every department of the organization must be running smoothly in order that this may be accomplished. His duty in this respect is active and not passive, and if the contractor's organization does not forward documents to him with sufficient promptness, he should take steps to bring this about.

45. He must remember at all times that the Government's accounting regulations and requirements as to auditing, are far more rigid than those of commercial organizations. [fol.108] He must impress upon every member of his staff that their discretionary powers are limited by the stipulations of the contract and the regulations of the Field Auditor's Manual.

46. It is of utmost importance that all records be kept at all times abreast with the work. The Field Auditor is not merely keeping a set of records, but his work consists of maintaining a continuous pre-audit kept up from minute to minute. Each day all matters pertaining to the preceding day must be duly approved and properly recorded. No arrears shall be allowed to accumulate.

47. He shall see that his department is economically administered having regard for the urgency of the work and that due care is exercised in the handling of Government property entrusted to him.

48. All accountability papers must be signed by the Constructing Quartermaster or the property officer if other than the Constructing Quartermaster is so designated or a commissioned assistant designated by him.

49. The Field Auditor must instruct all members of his staff that their work is entirely confidential and no information is to be disclosed by any one to anybody except through official channels.

Field Auditor's Staff

50. The basis for the organization of the Field Auditor's office shall be seven (7) general departments as follows:

Department	Head	Principal Duties
1. Fiscal	Chief Fiscal Auditor	Money Accountability
2. Materials	Chief Material Inspector	Receiving, Inspection and Delivery of Materials.
3. Labor	Chief Time Inspector	Supervising Time and Payrolls
4. Transportation	Chief Transportation Inspector	Handling Traffic and Claims
5. Tools and Equipment	Chief Equipment and Tool Inspector	Contract Property and Rentals.
6. Commissary	Chief Commissary Auditor	Supervising Commissary
7. Administrative	Administrative Assistant	Mail, Filing, Personnel General

51. Attached to this manual is an organization chart showing the departmental relations in the Constructing Quartermaster's Office in a general way. Two or more departments shall be combined under one head whenever conditions warrant it.

[fol. 109] 52. The Field Auditor shall furnish the Engineering Department of the Constructing Quartermaster with such cost data from financial records as shall be required. The cost analysis shall not, however, be in his charge but shall be prepared by the Cost Accounting Section of the Engineering Department.

53. Each and every employee of the Field Auditor's staff is obliged to carry out the instructions of the Field Auditor to the fullest extent in whatever department his services may be required.

54. The heads of the Departments shall be furnished, by the Field Auditor, with copies of this guide, general instructions to Constructing Quartermasters and, where necessary, all contracts and sub-contracts.

Fiscal Department

55. The Fiscal Department shall be in charge of the Chief Fiscal Auditor, who shall act in general supervision, under the Field Auditor, of all of the departments. In the absence of the Field Auditor, the Chief Fiscal Auditor will act for him in directing the operations of his staff. His principal duties include the following:

1. Final audit of all invoices, payrolls, etc.
2. Maintaining controlling account for Invoice Register.
3. Recording vouchers.
4. Maintaining record showing status of funds.
5. Maintaining liability record.
6. Preparation of financial reports.

56. The Chief Fiscal Auditor receives checked invoices from the Materials, Commissary and Tool Departments with the supporting papers and checked payrolls from the Labor Department with receipts attached.

57. He makes a detailed audit of all papers and checks the distribution. A file showing the approved signatures of all persons authorized to pass on vouchers, shall be kept for reference.

58. After having audited the papers, the Chief Fiscal Auditor will place his signature on the original and duplicate copies of the invoices and payrolls.

Materials Department

59. The Materials Department is administered under the supervision of the Chief Materials Inspector.

60. The principal duties of this department may be [fol. 110] grouped under five sub-divisions, as follows:

Branch	Head	Principal Duties
(a) Purchase Order	Order Clerk	Checking prices and recording of orders.
(b) Receiving and stores	Chief Receiving Clerk	Checking quantities received and supervising stores.
(c) Inspection	Chief Inspector	Inspecting quality
(d) Invoice	Invoice Clerk	Recording and checking invoices and maintaining statistical record of expendable materials.
(e) Property	Property Record Clerk	Maintaining property records.

Labor Department

61. It is the policy of the Construction Division that the contractor shall keep all time and prepare all payrolls, the Field Auditor maintaining an independent check of the time and auditing the payrolls. The time keeping system must be adapted to the particular requirements of the project.

62. The Labor Department shall have entire supervision of all labor accounting including the checking of time and payment of wages.

63. This department shall be in charge of the Chief Time Inspector whose principal duties are as follows:

- a. To maintain a record of employees.
- b. To make an independent check of the time of employees.
- c. To audit payrolls.
- d. To verify wages paid employees and to witness payment thereof.
- e. To check receipts for wages with payrolls in order to determine the amount to which the contractor is entitled for reimbursement.
- f. To maintain continuous record of unclaimed wages.
- g. To supervise team accounting in the same manner as labor accounting.

Traffic Department

64. The Traffic Department is administered under the supervision of the Chief Transportation Inspector. The duties of the Traffic Department include the following:

- a. Maintaining Traffic Records of all shipments received.
 - b. Preparing bills of lading for accomplishment by proper officer and maintaining record thereof.
 - c. Keeping in touch with downtown freight yards and depots, appointing special representative if necessary and notifying Materials Department in advance of arrival of freight.
 - d. Maintaining record of all demurrage and the reason for the accruing of the charge.
- [fol. 111] e. Preparing claims against carriers.

Equipment and Tools Department

65. The Equipment and Tools Department, dealing with the purchase and rental of all tools and equipment, shall be in charge of the Chief Equipment and Tools Inspector.

66. The duties of the Chief Equipment and Tools Inspector with respect to purchase of tools and equipment shall include the following:

a. To inspect all tools and equipment when brought on the work, and to see that they are in sound and workable condition.

b. To secure memorandum receipts for all non-expendable material for which the contractor is reimbursed.

c. To keep a close watch on the contractor's tool house and supervise methods of handling tools in order that wastage and loss may be reduced to a minimum.

67. The memorandum receipts for tools and equipment used by the contractor, whether signed by him or not, shall be held as a charge against the contractor until the completion of the work pending final settlement.

68. The contractor must properly safeguard the handling of tools. Where possible all tools should be passed through a general tool house and receipts taken from the men or sub-foremen as they are issued. It will be necessary for the contractor to maintain a file showing signatures of his foremen and sub-foremen for reference.

Commissary Department

69. The Commissary Department is administered under the supervision of the Chief Commissary Auditor.

70. The standard form of contract provides that the cost of all commissary operating personnel and supplies will be borne by the Contractor and that all commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Constructing Quartermaster may prescribe.

71. It will be the duty of the Chief Commissary Auditor to audit commissary expenses and receipts for the purpose

of determining that the provisions of the contract are properly carried out by the Contractor.

Administrative Department

72. The Administrative Department shall be in charge [fol. 112] of the Administrative Assistant.

73. His particular duties shall include direct charge of the following:

- a. Personnel.
- b. Mail, telegrams, etc.
- c. Files.
- d. Supplies.
- e. General.

74. The Administrative Assistant shall see that all documents and reports from the various departments, and also from the contractor, are properly and promptly forwarded to the Field Auditor.

75. He shall keep a daily record of time of all employees on the Field Auditor's staff and shall have charge of the payroll. He must familiarize himself with the Government regulations in respect to civilian employees and see that all records are kept and payments made in accordance with existing instructions and regulations. *

76. If so directed by the C. Q. M. the Administrative Department of the Field Auditors office may act as the Administrative Dept. for the entire office of C. Q. M.

77. Copy of Instructions to Contractors relating to accounting and auditing procedure under Cost-Plus-A-Fixed Fee Contracts immediately follows:

"Instructions to Contractors Relating to Accounting and Auditing Procedures Under Cost-Plus-A-Fixed-Fee Contracts."

General

1. The Constructing Quartermaster (C. Q. M.) in charge of the project controls the accounting methods and pro-

cedures under fixed-fee contracts through an auditing staff, headed by a Field Auditor, organized, generally, as follows:

Field Auditor

Department	In Charge Of
Fiscal	Chief Fiscal Auditor
Materials	Chief Materials Inspector
Labor	Chief Time Inspector
Transportation	Chief Transportation Inspector
Tools and Equipment	Chief Tools and Equipment Inspector
Commissary Administration	Chief Commissary Auditor Principal Clerk

[fol. 113] 2. The contractor will carefully observe the provisions of the contract respecting accountability and the related laws and Governmental regulations. Full cooperation will insure prompt reimbursement for expenditures. The Field Auditor makes a detailed pre-audit of all costs and expenses incurred prior to payment thereof by the contractor insofar as this is practicable. Upon receipt of the contractor's vouchers for reimbursement, verification will be readily possible by the Field Auditor. Thereupon the verified voucher will promptly be submitted to the C. Q. M. for his approval and certification to the Finance Officer for payment.

3. Essential general requirements that must be observed by the contractor are: (a) Make no commitment without subjection to the approval of the C. Q. M. (in advance if so required); (b) Support all vouchers for reimbursement with original invoices or original payrolls accompanied by original receipts from vendors or employees.

4. The Contractor's office procedure and accounting system will presumably be found adaptable to Government requirements. The Field Auditor will see to it that the practices are in line therewith.

Detailed Instructions

1. Purchases of Materials, Equipment, Etc.

- a. 3 bids required (where sources are available).

b. Purchase orders are subject to approval of the C. Q. M. See attached specimen form for instructions, copies required, etc.

c. Receipts of materials, etc. are to be checked and inspected by the C. Q. M. upon delivery.

d. Vendors' invoices—original (receipted) and three copies are required by C. Q. M.

e. Vendors' receipts are required on original invoices. In case of more than one invoice from a vendor, summary statement may be receipted.

2. Employees.—Wage Rates, Time and Payroll.

a. Wage rates are fixed by schedule determined by Labor Department.

b. Salaried employees' compensation shall be on basis of preceding year unless increase is approved by the C. Q. M.

c. All employees are to be hired subject to approval of the [fol. 114] C. Q. M. Personal history of each employee is to be on record.

d. Employees are to be checked in and out each day by the C. Q. M. and each morning and afternoon on the job.

e. Payroll deductions are limited to Social Security taxes and State taxes.

f. Payroll. Original (supporting reimbursement voucher) and three copies are required by C. Q. M.

g. Payment of wages must be witnessed by representative of C. Q. M.

h. Receipt for wages is required from each employee.

3. Rental of Equipment

a. Rental rates will be predetermined by the C. Q. M.

b. Rental contracts shall be subject to approval by the C. Q. M.

c. Valuation of rented equipment shall be subject to approval of the C. Q. M.

d. Title to rental equipment shall vest in the Government when total rental paid equals valuation (an additional 1% per month to be paid by the Government).

e. Rental equipment shall be in sound and workable condition.

f. Time of rental shall be verified currently by the C. Q. M.

g. Payment of rental shall be made monthly.

h. Receipts for rental shall be obtained from owner of equipment.

4. Transportation Charges On Materials And Equipment.

a. All transportation charges shall be verified and approved by the C. Q. M.

b. Original receipted freight or trucking bills shall accompany reimbursement voucher.

5. Traveling Expenses

a. All traveling expenses are subject to the approval of the C. Q. M.

b. Advance written approval of the C. Q. M. is required in particular respect to (1) transportation and traveling expenses to and from the work of the field forces, and (2) traveling and hotel expenses of officers, engineers and other employees of the contractor.

c. Travel expenses and subsistence shall conform to the allowances authorized by the "Standardized Government Travel Regulations", unless otherwise authorized by the C. Q. M.

d. Receipts from recipients of travel expense shall be required in each case.

[fol. 115] 6. Cash Discounts, etc.—The Contractor shall take advantage of all discounts and allowances.

7. Fixed Fee—Ninety per cent (90%) of the fixed fee shall be paid as it accrues in monthly installments based upon the percentage of completion of the work. The unpaid balance shall be paid upon final acceptance of the work.

8. Records—All records shall be preserved by the contractor for three years after completion of the work.

9. Bonds—The contractor shall furnish such bonds as may be required.

10. Contractor's Organization—The contractor shall furnish the organization charts and statements of procedure called for by the C.Q.M.

Office of the Quartermaster General
Chart of the Office of the Construction Division

	Chief of Construction Division	
Liaison Branch	Executive Office	Funds & Estimates Branch
Administration Branch	Construction Branch (Lump-Sum Contracts)	Accounting & Auditing Branch
Engineering Branch	(W.P.A. & P. and H. Work)	Repairs & Utilities Branch
Construction Branch (Fixed-Fee Contracts)	Legal Branch	Real Estate Branch
	Procurement & Expediting Branch	

[fol. 116]

Organization Chart
Office of the Constructing Quartermaster
For Work Under Fixed Fee Contracts Only

S C Q M

C Q M

Comm. Off.

Field Aud. See Cht. "A" (Civilian)	Property Off. Comm. Off.	Executive Officer Comm. Off.	Ton. Officer (See Cht A) Comm. Off.	Safety Engr. Fire Marshal & Sanit. Off. Comm. Off.	Chief Clerk (Civilian)
Supervision of Engineering by Government Check on Arch. and Engr. Plans and Serve in an Advisory Capacity as Directed by the C. Q. M. Necessary Com- missioned Off's. & Civilian Engrs as needed.	Architectural of Engineering Contractor For The Architectural and Engineering Design of Project including Supervision & Inspection During Constn. Force as decided With The CQM	Construction Contractor For The Construction of the Project Furnishes all Labor, Material and Equipment as provided in Contract Force as decided With the CQM	Supervision of Construction by Government Check on Const. Operations Necessary Comm. Officers and Civilian Assistants	Personnel Mail and Records Reports Statistics Files Stenogs. & Messengers	

Note: This chart is functional only and may be changed to suit local conditions. It must be understood that on a Fixed Fee Project the Fixed Fee Architectural or Engineering Contractors will do all the Architectural, Engineering and Inspection work and this Word should not be duplicated by the CQM. Maximum use will be made of Officers in a Supervisory Capacity. The American Railroad Association, Public Roads Administration under Federal Works Agency, and the National Board of Fire Underwriters may be requested to furnish representatives if needed.

[fol. 117]

**Chart of Field Auditor's Organization
Constructing Quartermaster
Field Auditor**

		Fiscal		Commissary			
		Chf Fis Aud		Chf Com'y Auditor		Administr've Assistant	
Materials	Labor	Traffic	Funds	Tools & Eqpt	Chf	Administr've	
Chf. Mat'l.	Chief Time	Chief Transp		Chief Eqpt	Com'y	Administr've	
Inspector	Inspector	Inspector		& Tools Insp	Auditor	Assistant	
Orders	Employee's	Traffic	Liability	Contract		Personnel	
Order Clk	Records		Records	Property			
	Record Clk						
Invoices	Time	Claims	Status	Rentals		Mail	
Invoice Clk	Time Chkrs		of Funds				
Recording	Pay Roll		Vouching			Filing	
	Pay Roll Clk						
Receiving	Payment of		Auditing			Supplies	
Rec'vg Clk	Wages						
	Payment Clk						
Receiving			Record'g			General	
Storing			Costs				
Issuing			Reports				
Inspecting			Statistics				
Inspector							
Property		Equipment	Labor	Revenue	Operating		
Records		& Supplies			Results		
		Mess Houses and	Stores				
Prices	Invoices	Warehousing	Time	Payroll	Cash	Payroll	Profit
						Deduct-	or Loss
						ions	
						Receipts	
						& Expend-	
						itures	

[fol. 118]

EXHIBIT "B"

War Department, Office of the Quartermaster General,
Washington

In Reply Refer to QM 300.5 (Fixed Fee Letter No. 5).

Subject: Relations between Constructing Quartermaster
and Contractor on Cost-Plus-A-Fixed-Fee Contracts.

To: The Constructing Quartermaster.

1. Considerable difficulty has arisen in the field due to the lack of understanding on the part of the Constructing Quartermaster in regard to his relations with the contractor who has been selected by this office to perform the work. Constructing Quartermasters should bear in mind at all times that construction being carried out under cost-

plus-a-fixed-fee contract is in the nature of a co-adventure between the contractor and the Government. The Constructing Quartermaster's principal function comprises general supervision of the contractor's operations and to see that Government interests are protected, and not to furnish technical supervision and directions for the contractor's work. Both the engineering and construction contractors have been paid a fair fee for doing their respective parts of the work and they should be given a free hand in doing these operations, insofar as they are consistent with good practice, and an accurate accounting is kept of all expenditures.

2. Your particular attention is invited to letter of this office, W.O.5 Fixed Fee Letter No. 1—Subject: Directive and Instructions on Cost-Plus-A-Fixed-Fee Contracts, C.B.F.F. General Field Letter No. 1, paragraph 3, it is felt that this gives you a clear definition of what is expected of you. In cases of borderline decisions between what you think is correct and the contractor's judgment based on his past experience of what he feels is the proper procedure, there should be a tendency to go the contractor's way so long as fundamental laws are not violated and the Government's interests are protected. In certain remote localities the actual securing of a number of bids on small purchases of one thousand dollars or less is frequently a hardship and costs more in telephone tolls and administrative expense than the savings involved and more seriously the securing of such a number of bids requires waste of valuable time. For such small purchases the contractor should be permitted to make the purchase in his customary manner at what you and his purchasing agent consider to be a fair market price. On many occasions it will only be possible to get one quotation and if such quotation is satisfactory on its face and [fol. 119] appeared to be a just price, you should not hesitate in permitting the contractor to make these purchases in order that the progress of the work will not be delayed.

3. The only restriction that has been placed upon the salary of contractors' employees is that no employee receiving in excess of \$9,000 per year will have his salary reimbursed by the Government. Salaries below that figure are subject to your approval and need not be submitted to this office for final approval. In this we rely on you to use your best judgment in determining whether or not the man employed has a record in the past that will justify the

salary to be given. It should be borne in mind that to complete these projects in the time required, a high calibre type of personnel must be employed by the contractor and in order to secure that type of personnel the contractor must of necessity pay a substantial salary at all times somewhat in excess of what the person has been accustomed to receiving, due to the employee having to leave his home and set up a new residence or maintain a double establishment for a very short period of time, and furthermore, it should be recognized that certain men during the past few years have worked at salaries below their normal capacity due to the scarcity of jobs which they are qualified to fill.

4. It has been noted that in some cases the Constructing Quartermasters have been requiring their contractors to take out certain forms of fire insurance. Subject to your approval this insurance is a matter for the contractor to decide on, so long as the property is in his possession and has not yet become the property of the Government but as soon as such property arrives at the site and is checked in by your inspecting staff and actually becomes the property of the Government, there is no need for fire insurance inasmuch as the Government has always been a self-insurer and, due to the volume of material handled by the Government, it has not been found economical to insure its own property. Extreme care, however, must be taken to guard against loss by fire and mechanical fire extinguishers, fire barrels, etc., must be liberally distributed over the job and alert watchmen maintained at all times to guard against fire. This office will recognize requisitions for fire fighting equipment to be sent to projects whenever the Constructing Quartermaster feels that it is required in connection with his work.

5. It being wholly impossible to foresee and enumerate in the contracts all of the items of materials, services, and labor (which terms are all inclusive) to be furnished or provided by the contractors, the contracts enumerate only [fol. 120] the major items specifically required by the contracts and certain other items which could be foreseen as likely to enter into the operations under the contracts. The contracts, therefore, provide that the term "actual net cost" shall include specifically but not exclusively the items enumerated. Inevitably many unforeseen items of cost arise during the progress of the work of the character and magnitude of that covered by these contracts.

6. The present authorization for the use of cost-plus-a-fixed-fee contracts was justified by the very unusual construction program involved in the development of outlying posts where there are no ready contacts with labor and material markets, where the working conditions are hazardous, and the time element was of serious moment. The speedy and certain accomplishments of the projects covered by the contracts was and is considered by those bearing the burden of responsibility for the national defense as of the utmost importance. The contractors selected to cooperate with the Government and contribute their resources, experience, and skill toward the accomplishment of the project, include in their organizations men of unquestionable integrity and patriotism. Their success in the commercial world establishes their abilities. Their judgment along the lines of their qualifications is entitled to the highest of faith and credit. The monetary compensation they will receive is comparatively modest as indicated by the fees allowed. The general intent of the special legislation, the negotiations thereunder, and the contracts is clearly that the contractors shall be made whole for their out-of-pocket expenditures for the benefit of the work under the contracts, as may be approved or ratified by the contracting officer, acting under the direction of the Secretary of War. Any action which conforms to such general intent is entitled to approval.

For The Quartermaster General:

E. E. Kirkpatrick, Captain, Q. M. C. Assistant.

40/1600.

[fol. 121]

EXHIBIT C

War Department

Office of the Quartermaster General, Washington.

[Stamp] Received Feb. 24, 1941, C. Q. M. Fort McClellan, Alabama.

In Reply Refer to QM 300.5 C-C.

February 19, 1941.

Construction Division Letter No. 101

Subject: Responsibility of local Constructing Quartermasters and relationship with Architect-Engineers and Construction Contractors on Projects.

To: All Zone Constructing Quartermasters, All Local Constructing Quartermasters, All Architect-Engineers (through local C. Q. M.), All Construction Contractors (through C. Q. M.)

1. The local Constructing Quartermaster is the official in responsible charge of the project to which he is assigned. He is the authorized representative of the Government on the project. He will discharge his duties under the direction and supervision of the Quartermaster General through the orders and instructions of the Chief of the Construction Division and the Zone Constructing Quartermaster of the Zone in which his project is located. In the absence of the local Constructing Quartermaster the next senior assistant Constructing Quartermaster will function in his stead unless otherwise arranged by the Zone Constructing Quartermaster.

2. The Architect-Engineers and the Construction Contractors on the project together with the military and civilian assistants assigned for duty with the local Constructing Quartermaster will report to and are responsible to the local Constructing Quartermaster as the authorized representative of the Government in charge of the project.

However, nothing is contemplated in the operations of the project which relieves the Architect-Engineer and the Contractor of their responsibility to the Government for sound and economical fulfillment of their contractual and professional obligations.

3. The Local Constructing Quartermaster will:

a. Insure compliance with terms of contracts.

b. Assure correctness of expenditures.

[fol. 122] c. Serve as a liaison officer for the Architect-Engineer and for the Construction Contractor in all phases of government operations.

d. Obtain full information as to Government Requirements so as to facilitate the work of the Architect-Engineer and the Construction Contractor.

e. Negotiate contractual arrangements involving sewage disposal with municipalities, right-of-way with adjoining property owners, railroad spurs and the like, subject to the advice and such approval as is necessary by the office of

the Quartermaster General. In this the local Constructing Quartermaster may use the services of the Architect-Engineer or the Contractor.

f. Approve or secure approval of sub-contracts submitted by the Construction Contractor or the Architect-Engineer.

g. Promptly transmit instructions and information to the Architect-Engineer and the Construction Contractor received from the office of the Quartermaster General in Washington.

h. Act or secure action promptly on all requests or recommendations of the Architect-Engineer or of the Construction Contractor.

i. Exercise overall supervision of the project to insure that all phases of it are being soundly coordinated.

4. The Architect-Engineer, under the direction of the Local Constructing Quartermaster, will:

a. Insure that the project requirements are met in accordance with sound design and construction practice, including the overall project layout, as well as the design and arrangement of specific structures and utilities. Standard Army structures will be employed unless the Architect-Engineer's review of the plans indicates a practice that he deems unsuitable, in which case he will make suitable recommendations, with reasons therefor, to the local Constructing Quartermaster.

b. Insure that construction conforms with design, and make or require to be made such tests and inspections as may be necessary to determine quality and conformity with plans and specifications.

c. Prepare a sound estimate of overall cost and the costs [fol. 123] of the major parts of the project, including such breakdown as may be required by the local Constructing Quartermaster.

d. Prepare, in conjunction with the Construction Contractor, job progress schedules.

e. Report on and make recommendations as to the relationship of actual progress and scheduled progress, the actual costs and estimated costs.

f. Perform such other duties as directed by the local Constructing Quartermaster.

5. The Construction Contractor, under the direction of the local Constructing Quartermaster, will:

a. Conduct, in an efficient manner, all phases of the construction work. Important in this is a prompt and comprehensive organization set-up to insure effective job planning, forward-looking handling in the employment of labor, including wages, conditions of work, safety, food, housing and transportation; procurement of materials and methods to facilitate storage, distribution and fabrication in the field at the location desired; procurement of good construction equipment. In the procurement of materials there is involved the responsibility to take such steps as are necessary to insure delivery of materials where the initial procurement steps have been taken by Government agencies; lumber, heaters, and boilers for hospital units are examples.

b. Advise the Architect-Engineer in the preparation of a sound estimate of overall cost, and a breakdown of the cost of the larger parts of the project; concur in such estimates or make notation of exceptions; advise Architect-Engineer when any revision of estimates becomes necessary; install adequate cost control procedures.

c. Prepare, in conjunction with the Architect-Engineer, job progress schedules; advise Architect-Engineer when any changes become necessary; install adequate progress control procedures.

d. Maintain such cost data as is required by the Government.

6. On projects, such as Ordnance Manufacturing Plants, a Design-Consultant may be employed to insure that the plant is of sound design and such as to best meet the operating conditions imposed by the Using Service for which the plant is being constructed. Close cooperation between the Using Service, the Design-Consultant, the Architect-Engineer, the Construction Contractor, and the [fol. 124] local Constructing Quartermaster is therefore of paramount importance in order to insure the construction of a plant with satisfactory operating characteristics.

The Using Service is the service for which the plant is

MICRO CARD

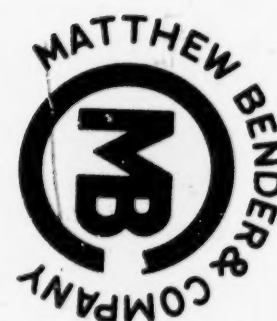
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being constructed and is the service which will be responsible for the operation of the plant. Its position is analogous to that of a client in private construction practice. The local Commanding Officer of such plant is the representative of the Using Service on the ground and is responsible that the needs of that Service are fully considered at all times.

The needs of the Using Service will be communicated to and carried out on the project through the local Constructing Quartermaster, unless they contravene standing orders, existing policy, are extravagant or contrary to sound engineering practice. In such cases the matter will be referred at once to the Zone Constructing Quartermaster.

7. On projects at troop stations, as distinct from manufacturing plants, the Local Constructing Quartermaster is not authorized to undertake any program changes desired by local authorities unless and until such changes are concurred in by the Zone Constructing Quartermaster and approved by this office.

8. All previous instructions at variance with the provisions of this letter are hereby rescinded.

For the Quartermaster General:

Brehon Somervell, Brigadier General, U. S. A.,
Assistant.

Distribution List:

12 Copies to Each Zone Constructing Quartermaster,
5 Copies to Each Constructing Quartermaster, Copies to
All Branches, Control Section and Public Relations Section,
Construction Division, War Department and Bureaus
Concerned.

EXHIBIT "D"

[fol. 125] Conference Held With Dunn Construction Company and John S. Hodgson and Company

Conference Held in Room 2241, Munitions Building, Washington, D. C., September 6, 1940, with Mr. W. R. J. Dunn of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of the John S. Hodgson & Company of Birmingham, Alabama, Representing the Contractor: and Lt.

Colonel E. G. Thomas, Mr. H. W. Loving and Mr. F. J. O'Brien, Representing the Government Relative to Construction of Camp McClellan, Alabama, with Mr. Loving Presiding.

MR. LOVING:

Mr. Dunn, as I advised you this afternoon, you and Mr. Hodgson have been recommended by the Construction Advisory Branch for consideration in connection with the construction of the permanent tent camp to be built at Camp McClellan, Alabama. I showed you a description and estimate of cost of the work to be done which consists of utilities estimated to cost approximately \$796,700 and temporary buildings of various kinds estimated to cost \$2,674,250, which with certain tents for troops which are displaced by the hospital, will make a total project cost including overhead, engineering and contingencies of approximately \$3,702,935. Based on the best information available at this time we estimate that the net construction cost plus the contemplated fee to be paid the contractor totals \$3,335,977. As I advised you further, time is vitally important in this particular instance as it is desired if humanly and physically possible, to complete this project by October 15th. Practically all of the plans are complete. However, it will be necessary for the Government to retain private engineers to make certain surveys locally, to develop a topographic map to design the utilities, to place these standard buildings to be constructed on the definite site. It is contemplated that this engineer be employed immediately and that the necessary engineering work to be done without delay. Further, that construction parallel the engineering work and completion of plans as closely as possible. From your questionnaire I note that the combined annual value of work done by the Dunn Construction Company and John S. Hodgson & Company, has averaged about \$3,000,000 in recent years. I would like to ask what volume of work both of you have under construction at this time, or under contract?

Mr. Dunn: The two companies have today between \$100,000 and \$125,000 of uncompleted work on hand.

[fol. 126] Mr. Loving: You, therefore, then based on your statement of average volume, are in a position insofar as finances, personnel and equipment are concerned to under-

take approximately \$3,000,000 work at this time. Is that correct?

Mr. Dunn: At least that much or more.

Mr. Loving: Do you contemplate, if awarded contract for construction of the work at Camp McClellan, to continue active in the competitive market?

Mr. Dunn: Except for exceptional isolated cases, in dealing with old customers, where the volume is small, we do not expect to continue in the competitive field.

Mr. Loving: Considering the time element, it is anticipated that it will be necessary for the members of both organizations to devote practically their entire time toward planning, organizing, purchasing and directing the construction of this project in order to complete the project within the desired time. If awarded the contract may we count on the cooperation and direction of you two gentlemen as principals, and your other key men except in the instances to which you refer?

Mr. Dunn: Yes, sir.

Mr. Loving: For your information, Mr. Dunn, there is a feeling in certain quarters that there are few men in the South, possessing the necessary experience, organization, energy, vision and initiative required to handle a project of this character. Personally I do not share this belief and do not consider the fact that a successful contractor has not actually executed contracts of like volume as definitely proving that he can not if he devotes his time, attention and organizing ability to it, organize to handle a job of this magnitude. If you are retained to handle this job I feel to a large extent that the honor and pride of the State of Alabama will be largely at stake. The Government has selected Fort McClellan as a site for an important camp and I feel that you as principals of these two contracting firms and others who have pride in accomplishment of the citizens of Alabama, could do nothing better than to put their shoulders to the wheel, cooperate to the fullest extent, to show the War Department and critics from other sections that you, as contractors, the suppliers of labor, materials and equipment in Alabama, can accomplish results as efficiently and as economically as anyone else from any other part of the country. Mr. Dunn, as a result of work that you did under the direction of my old engineering firm and my personal knowledge of your business capacity and general standing in your community. I am assuming the responsi-

[fol. 127] bility of offering to you and Mr. Hodgson the job of undertaking the construction of this project at Camp McClellan, believing that you will take a personal pride in this project, and having faith that I will never have cause to regret having recommended you, a Southern contractor, to undertake this project. In order to expedite the delivery of lumber, heaters, pipe and other standard articles of materials required for the project we are now having made a complete material take-off and as soon as this information is available, it is contemplated that the Government, through Procurement Branch, will enter the market and attempt to locate and secure firm quotations for these materials. It is contemplated that if satisfactory prices can be secured, definite orders for all of the lumber will be placed and instructions for shipment and delivery will be made without delay. As I informed you, it is estimated that approximately \$3,778,000 will be required for the construction of the project and the payment of engineering, overhead and supervision expenses. At present there is actually available \$400,000 leaving a deficit as of today of approximately \$3,378,885 which deficit it is anticipated the Congress will cover by making additional appropriations available for this work. It is contemplated that a contract be prepared and executed to cover the entire work planned but it will be necessary to include in the agreement, a provision to the effect that if additional funds are not made available by the Congress that expenditures incurred by you shall not exceed \$400,000. This means that it will be necessary for us to review and check the plans for the project and to select certain utilities and certain structures to be constructed which can be built within the funds now available. It is my understanding that you consider you are equipped and prepared to handle the construction of all items of work with your own forces except inside electrical work, plumbing and heating, and possibly the outside electric distribution system. Is that correct?

Mr. Dunn: Yes Sir. From what we have seen, from what we know about the project now, we think that is the case.

Mr. Loving: I may state that the project embraces certain relatively simple building projects and certain simple utilities, such as water and sewer plants, roads, railroads, telephone and electric distribution systems.

Mr. Dunn: The only parts of the work that we contemplate subletting are such parts as time and money would be saved by subcontracts.

[fol. 128] Mr. Loving: We recognize, Mr. Dunn, that but few, if any, general contractors are fully equipped and manned to undertake every phase of building construction. We recognize that it is customary for the average general contractor to sub-let inside electrical plumbing and heating and similar mechanical work. According to the best estimate we are able to prepare at this time to estimate the net construction cost exclusive of overhead, engineering and fixed fee to be paid the general contractor at \$3,304,588 and based on a schedule of fixed fees, which is being paid on all of these projects of like character, we estimate it is worth a fixed fee to the Government, to have this work performed for \$128,865. I would like to ask if such a fee would be entirely satisfactory and acceptable to you gentlemen?

Mr. Dunn: We are delighted to do this work at the fee which you have set up as compensation for same.

Mr. Loving: While we do not anticipate that this Camp will not be built in its entirety, yet I want it clearly understood that there is only \$400,000 available at this time and if for unexpected reasons only \$400,000 is spent, the fee to be paid you will be paid pro-rata on the same basis as the fee applying to the entire project. The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs and in case only \$400,000 is spent, then in settling with you we would expect to pay you an equivalent fixed fee on the amount actually spent. You, of course understand Mr. Dunn, from the questionnaire, that it is not contemplated that any of your executive officers or any member of the firm, if either of you are *are* a partnership, will be paid on a reimbursable basis.

Mr. Dunn: Yes Sir, we understood that.

Mr. Loving: You likewise understand that we have adopted a policy of paying no man on any project in excess of \$9,000 or more than he earned last year. However, in determining his present salary recognition will be given to the fact that double shift operations may be required which would result in the man doing twice the normal work that he would do. Under these circumstances I think we would recognize a reasonable increase in his salary, which increases, however, must be approved by the Constructing Quartermaster.

Mr. Dunn: We had understood that.

Mr. Loving: Mr. Dunn, have you handled other work on a cost-plus basis on which you placed your equipment on a rental basis?

Mr. Dunn: Yes, we have done that.

[fol. 129] Mr. Loving: Have you in general followed the rental schedule established by the Associated General Contractors which is recognized and considered by both owners, clients, engineers, architects and suppliers of equipment as being the best standard available at this time.

Mr. Dunn: In general, that has been our rule.

Mr. Loving: In such instances has the lessee of the equipment paid the freight both ways?

Mr. Dunn: Yes, sir.

Mr. Loving: You would expect that in this instance?

Mr. Dunn: Yes Sir.

Mr. Loving: There are certain formalities that must be gone through from now on, Mr. Dunn, the first being to secure the clearance of our negotiated agreement by the National Defense Council. It is hoped that this may be accomplished tomorrow and that the contract may be ready for execution, we hope, by tomorrow. Is it your plan to remain in the city until that is accomplished?

Mr. Dunn: If you think it will be done tomorrow, I will be mighty glad to remain in the city. Mr. Hodgson will remain anyway, whether I go home or not. If I go home tomorrow I will return Sunday nite and be here Monday morning. I would prefer to do that, but I don't want to delay this. I would like to say that I am subject to your orders or wishes in this matter.

Mr. Loving: Under the conditions we anticipate may arise I think if you are back by Monday morning that will be sufficiently early. Before we adjourn, I want to ask that you hold this meeting in strict confidence and no not announce to anyone that you have been selected, subject to the approval of the National Defense Council and The Assistant Secretary of War until after the contract has actually been executed.

Mr. Dunn: We will be glad to do that, sir.

EXHIBIT "E"

WBH/SEB

February 8, 1941.

Memorandum To:)

Dunn Construction Company, Inc.,
 John S. Hodgson & Company,
 Fort McClellan, Alabama.

1. Attached is a list of your Administrative and Field Overhead as of February 1, 1941. With the Project in the finishing stages and with the field force so greatly reduced, it is the opinion of this office that the high price overhead is entirely out of line.

[fol. 130] 2. It is requested that steps be taken to reduce this administrative and field overhead.

(S.) Wm. H. Bell, Jr., Major, QMC, Constructing Quartermaster.

EXHIBIT "F"

DBJ/esh

War Department

Office of the Constructing Quartermaster

Fort McClellan, Alabama

November 14, 1940.

In Reply Refer to QM 248.

Subject: Over-time for Sheet Metal Workers.

Memorandum to:

Dunn Construction Co. and
 John S. Hodgson Co.
 Fort McClellan, Ala.

1. Due to the severe cold weather and the immediate necessity for heat in such buildings as are now occupied by

troops, and due to the limited number of sheet metal workers available, you are authorized to work sheet metal workers over-time to the extent that is necessary to take care of the present emergency.

For the Constructing Quartermaster.

(S.) Dudley B. Jones, Capt. (FA) QM-Res. Executive Officer.

cc to Mr. Spicer.

Certified. A true copy.

Thomas H. Doyle, Captain, Q.M.C., Constructing Quartermaster.

EXHIBIT "G"

MPA/SEB

War Department

Office of the Constructing Quartermaster

Fort McClellan, Alabama

November 12, 1940.

In reply refer to

Dunn Construction Company, Inc.,
John S. Hodgson & Company
Fort McClellan, Alabama.

1. This is to inform you that all wages with the exception of office help paid for Armistice Day, November 11th, are to be calculated at time and one-half.

[fol. 131] (S.) S. C. MacIntire, Jr., Major, QM-Res.,
Constructing Quartermaster.

Certified a true copy.

Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "H"**Dunn Construction Co., Inc.****and****John S. Hodgson & Co.****Contractors****Fort McClellan, Alabama****February 17, 1941.****Major Wm. H. Bell, Jr., Constructing Quartermaster, Fort
McClellan, Alabama.****DEAR SIR:**

Permission is hereby requested for electricians to work overtime as of this date to install motor in the Asphalt Plant.

Very truly yours, Dunn Construction Co., Inc., and
John S. Hodgson & Company. By (S.) G. H.
Stout, Project Manager.

GHS/gp:**Certified a true copy.**

**Thomas H. Doyle, Captain, Q. M. C., Constructing
Quartermaster.**

EXHIBIT "I"**War Department****Office of the Constructing Quartermaster****Fort McClellan, Alabama****February 17, 1941.****In reply refer to****Memorandum To:**

**Dunn Construction Company, Inc., John S. Hodgson & Com-
pany, Fort McClellan, Alabama.**

**1. You are authorized to work electricians overtime to in-
stall the motor in the Asphalt Plant.**

**(S.) Wm. H. Bell, Jr., Major, QMC, Constructing
Quartermaster.**

Certified a true copy.

**Thomas H. Doyle, Captain, Q. M. C., Constructing
Quartermaster.**

[fol. 132] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

ORDER OF SUBMISSION

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register. June 13, 1941.

Walter B. Jones, Judge.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTE OF SUBMISSION

Complainant, being called, offers the following testimony, to-wit:

1st. Notice of appeal from final assessment for sales taxes from January 1, 1941, to March 31, 1941, etc.

2nd. Transcript of record from State Department of Revenue, and amendment thereto.

3rd. Supersedeas Bond and Appeal Bond to Circuit Court, In Equity.

4th. Bill of Complaint or Petition, filed May 29, 1941.

5th. Agreed Statement of Facts.

6th. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and exhibits thereto.

Defendant, State of Alabama, being also called, offers the following testimony, to-wit:

1st. Transcript of record from State Department of Revenue, and amendment thereto.

2nd. Exceptions and motion to strike petition of United States of America to intervene.

3rd. Demurrer and answer to Petition of Intervention filed by United States.

4th. Demurrer and answer to Bill of Complaint or petition of Complainant.

5th. Agreed Statement of Facts.

6th. Testimony of Complainant's witnesses on cross-examination.

Intervener, United States of America, being called, offers:

1st. Petition to intervene and Order allowing same.

2nd. Petition of Intervention of United States of America.

[fol. 133] 3. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and Exhibits thereto.

I hereby certify that the above Note of Testimony is correct, this 13th day of June, 1941.

Geo. H. Jones, Jr., Register. Fred L. Blackman, Knox, Liles, Jones & Blackman, Solicitors for Appellant. Thomas S. Lawson, Attorney General. John W. Lapsley, Assistant Attorney General. J. Edward Thornton, Assistant Attorney General, Solicitors for Appellee. United States of America as Intervener. By: Thomas D. Samford, United States Attorney, and Hartwell Davis, Assistant United States Attorney, as Solicitors for Intervener.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA,
IN EQUITY

KING & BOOZER, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellant

VS.

THE STATE OF ALABAMA, Appellee

FINAL DECREE—Filed June 13, 1941

This cause coming on to be heard was submitted for a final decree on May 29, 1941, upon the petition of the appellant, and the answer of the appellee thereto, petition of the Intervener, and answer thereto, and the testimony as noted by the Register, including a stipulation in writing made by

the parties to this cause and filed herein; and it appearing to the Court that the assessment made by the State Department of Revenue of the State of Alabama against said appellant on the 15th day of May, 1941, in the amount of \$1,236.71 tax for the period from January 1, 1941, through March 31, 1941, \$123.67 penalty thereon, together with interest thereon as shown by said assessment, for sales taxes [fol. 134] ascertained and determined to be due by said appellant to the State of Alabama under the provisions of the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama of 1939, approved February 8, 1939, from which assessment an appeal was taken by the appellant to this Court, was validly made; that neither the levy nor assessment of said tax by the State of Alabama against the appellant for said period nor any provision in said Act for the passing on or collection of said tax or the amount thereof by appellant from Dunn Construction Company, Inc., and John S. Hodgson and Company, under the facts and circumstances shown in this cause, for the period involved in said assessment, was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States of America; that neither said Dunn Construction Company, Inc., nor John S. Hodgson and Company, whether acting separately or jointly, was, during the period covered by said assessment, an agent or instrumentality of the United States; nor does it appear that the imposition of said tax constituted a prohibited interference with the performance by said Dunn Construction Company, Inc., and John S. Hodgson and Company of the contract executed by and between them and the United States of America under date of September 9, 1940, and in connection with the performance of which contract said contractors purchased from appellant at retail within the State of Alabama certain tangible personal property, the gross proceeds from the sale of which was included within the computation of the tax liability of appellant for said period under the terms and provisions of said Act; that neither said Act nor said assessment imposed a direct burden upon the United States and that such burden as is imposed upon the United States with respect to such tax is remote and consequential, for the amount of which the United States expressly agreed to reimburse said contractors as a part of the costs of the

construction provided for under the terms of said contract. It is, therefore,

Ordered, Adjudged and Decreed by the Court:

1. That the assessment made by the State Department of Revenue of Alabama on May 15, 1941, against King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, for an additional amount of sales tax for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1,236.71 tax, and \$123.67 penalty thereon, together with interest upon the amount of said tax from April 20, 1941, is in all things sustained and confirmed, for which execution may issue as provided by law.

[fol. 135] 2. That the costs of this appeal, to be taxed by the Register be paid by the appellant, King & Boozer, for which execution may issue.

Done this the 13 day of June, 1941.

Walter B. Jones, Circuit Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed June 16, 1941

Comes Now King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellants, and the United States of America, Intervener, in the above-styled case, and give notice that an appeal is taken from a decree entered in this cause on the 13th day of June, 1941.

Done this 16th day of June, 1941.

Fred L. Blackmon, Knox, Liles, Jones & Blackmon,
Solicitor for Appellants. United States of America,
by Thomas D. Samford, United States Attorney.

[fol. 136] Citation in usual form showing service on Thomas A. Lawson, omitted in printing.

[fols. 137-138] Supersedeas and cost bond on appeal for \$3,000 approved and filed June 16, 1941, omitted in printing.

[fol. 139] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity, do hereby certify that an appeal was taken in the above stated cause on the 16th day of June, 1941, by the Complainant and Intervener, from a decree rendered in said cause on the 13th day of June, 1941, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the present term of said Court.

I further certify that King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer, is principal, and National Surety Corporation is surety on Supersedeas Bond and Security for costs of appeal.

Given under my hand and seal of office, this the 17th day of June, 1941.

Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity.

[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 141] IN SUPREME COURT OF ALABAMA

KING & BOOZER, a partnership composed of Tom Cobb King and Simon Elbert Boozer, residents of Calhoun County, Alabama, Appellant

VS.

THE STATE OF ALABAMA, Appellee

THE UNITED STATES OF AMERICA, Intervener

ASSIGNMENTS OF ERROR

The Circuit Court erred:

(1) In holding that the assessment made by the State Department of Revenue for the State of Alabama on May

15, 1941, against King & Boozer, a partnership, for sales taxes in the amount of \$1,236.71 and penalty thereon of \$123.67, together with interest as shown by the assessment for the period from January 1, 1941, through March 31, 1941, was valid.

(2) In holding that neither the levy nor assessment of the additional tax, nor any provision of the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama, 1939, approved February 8, 1939, for the passing on or the collection of the tax or the amount thereof from Dunn Construction Company, Inc., and John S. Hodgson & Company was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States.

(3) In holding that neither the Dunn Construction Company, Inc., nor John S. Hodgson & Company, acting separately or jointly, was during the period covered by the assessment an agency or instrumentality of the United States.

(4) In holding that the imposition of the tax did not constitute a prohibited interference with the performance by Dunn Construction Company, Inc., and John S. Hodgson & Company of their contract with the United States dated September 9, 1940.

[fol. 142] (5) In holding that neither the Alabama statute under which the tax was purportedly levied nor the assessment imposed a direct burden on the United States.

(6) In holding that such burden as is imposed upon the United States by such tax is remote and consequential.

(7) In holding that the United States has expressly agreed to reimburse the contractor for such taxes as a part of the cost of the construction provided for under the terms of the contract.

(8) In sustaining and confirming the assessment made by the State Department of Revenue of Alabama on May 15, 1941, against King & Boozer, a partnership, for an additional amount of sales taxes for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1,236.71 tax and \$123.67 penalty thereon, together with interest upon the amount of the tax from April 20, 1941.

(9) In failing to hold that the assessment of May 15, 1941, was based upon sales by King & Boozer of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States in execution of the contract of September 9, 1940.

(10) In failing to hold that sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company are immune from taxation by the State of Alabama under the Constitution of the United States of America.

(11) In failing to hold that the sale of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States is exempt from taxation under Subsection (a) of Section 5 of the Act No. 18, of the Legislature of Alabama, Session of 1939, as approved February 8, 1939.

(12) In failing to hold that the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States in execution of the contract of September 9, 1940, were consummated at Camp McClellan, Anniston, Alabama; that the camp is within an area within the exclusive jurisdiction of the United States; and that such sales are immune from taxation by the State of Alabama under the Constitution of the United States of America.

(13) In failing to hold that the State Department of Revenue of the State of Alabama in applying Act No. 18 of the General Acts of Alabama, 1939, aforesaid to the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States have applied Act No. 18 in a manner which renders the Act invalid and void under the Constitution of the United States of America.

(14) In failing to hold that the Alabama Sales Tax Act, Act No. 18 of the General Acts of Alabama, 1939, approved February 8, 1939, insofar as it subjects to taxation the sales of tangible personal property to the United States or to the United States through Dunn Construction Company, Inc., and John S. Hodgson & Company as agents and instrumentalities of the United States is invalid and void because violative of the Constitution of the United States of America.

(15) In not adjudging and decreeing that the assessment of May 15, 1941, is illegal, contrary to law and null and void.

(Signed) Fred L. Blackmon, Knox, Liles, Jones & Blackmon, Attorney- for King & Boozer, a partnership composed of Tom Cobb King and Simon Elbert Boozer.

Thomas D. Sanford, United States Attorney, Attorney for United States of America, Intervener.

[fol. 144] IN SUPREME COURT OF ALABAMA

Montgomery Circuit Court, In Equity

3 Div. 351

KING AND BOOZER, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, United States of America, Intervener,

VS.

THE STATE OF ALABAMA

ORDER OF SUBMISSION—June 23, 1941

Come the parties by attorneys, and argue and submit this cause for decision with 3 Div. 350.

[fol. 145] IN SUPREME COURT OF ALABAMA

ORDER CALLING SPECIAL TERM OF COURT—July 28, 1941

It Is Ordered that a Special Term of the Supreme Court of Alabama be begun and held at the Judicial Building in Montgomery, Alabama, on Monday, July 28th, 1941, for

the purpose of considering and disposing of any and all matters as the Court may determine, and to continue in session from day to day until adjourned by the Court.

Lucien D. Gardner, Chief Justice; William H. Thomas, Associate Justice; Virgil Bouldin, Associate Justice; Joel B. Brown, Associate Justice; Arthur B. Foster, Associate Justice; — — —, Associate Justice; J. Ed. Livingston, Associate Justice.

[fol. 146] In compliance with the foregoing order, a Special Term of the Supreme Court was begun and holden according to law on July 28th, 1941.

Present as Justices of said Court:

Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston.

Knight, J., not sitting.

Present as Officers of the Court:

Clerk, J. Render Thomas.

Marshal, Travis Williams.

The Supreme Court adjourned until Tuesday, July 29th, 1941, at 10 o'clock A. M. ———

[fol. 147] IN SUPREME COURT OF ALABAMA

Montgomery Circuit Court, In Equity

3 Div. 351

KING & BOOZER, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, Residents of Calhoun County, Alabama (The United States of America, Intervener),

vs.

THE STATE OF ALABAMA

Present: Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston.

Knight, J., not sitting.

DECREE—July 29, 1941

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is con-

sidered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered and ordered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree that the Circuit Court should have rendered, doth order, adjudge, and decree that the final assessment made on the 15th day of May, 1941, under the provisions of the Alabama Sales Tax Act by the Department of Revenue against the Appellants, King & Boozer, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, for sales tax for the period beginning January 1st, 1941, and ending March 31st, 1941, in the amount of \$1,236.71, and \$123.67 penalty thereon, and interest in the amount of \$12.37, making a total amount of \$1,372.75, be and the same is hereby set aside, vacated and declared to be void and of no effect, and it is further ordered, adjudged and decreed that the Appellants are not liable for said tax, penalty and interest thereon.

It is also considered, ordered, adjudged and decreed that the costs of appeal of this Court and all of the costs of the [fol. 148] Circuit Court be taxed against the Appellee, The State of Alabama.

[fol. 149] IN SUPREME COURT OF ALABAMA

Special Term 1941

3 Div. 351

KING AND BOOZER

vs.

STATE OF ALABAMA

Appeal from Montgomery Circuit Court, In Equity

OPINION

LIVINGSTON, Justice.

This is an appeal from a decree of the Circuit Court of Montgomery County, In Equity, confirming an assessment made by the State Department of Revenue on May 15, 1941, against King and Boozer, a partnership composed

of Tom Cobb King and Simon Elbert Boozer, for sales taxes for the period beginning January 1, 1941, and ending March 31, 1941, in the sum of \$1236.71 tax and \$123.67 penalty thereon. The decree of the circuit court was entered on June 13, 1941, and the appeal therefrom to this Court was duly perfected on June 16, 1941.

The tax here involved was assessed under the provisions of the Alabama Sales Tax Act (General Acts 1939, page 16) on the gross proceeds of sales of tangible personal property, consisting of lumber purchased from King and Boozer in connection with the performance of a contract entered into by Dunn Construction Company, a corporation, and John S. Hodgson and Company, a partnership, [fol. 150] jointly performing the contract, and hereinafter called the contractor, with the United States of America, hereinafter called the Government, on September 9, 1940, for the construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at Fort McClellan, Alabama.

The facts necessary for the decision are, in addition to the above, substantially as follows:

The contract between the Government and the contractor is designated as a cost-plus fixed-fee construction contract. It states that the estimated total cost of construction work to be in the approximate amount of \$3,204,588, exclusive of the contractor's fee, subject to the express understanding that the contractor does not guarantee the correctness of the estimate, which is recited to be based upon a detail estimate agreed upon by both the Government and the contractor. The contract states that a fixed fee of \$128,865 is to be paid to the contractor, which shall constitute complete compensation for the contractor's services including profit and all general overhead expenses.

The contract provides that the contractor shall furnish all labor, materials, tools, machinery, equipment, facilities and supplies not furnished by the Government, and shall do all things necessary for the completion of the work in accordance with the drawings, specifications and instructions contained in the contract, or to be furnished by the contracting officer,—the officer who executed the contract on the part of the Government and who was in charge of the construction work, by or through his authorized representative.

The contract further provides that in addition to the payment of the contractor's fixed fee, the contractor shall be reimbursed for such of his actual expenditures in the performance of the work as may be approved and ratified by the contracting officer, and for payment of rental to the contractor for the construction plant or parts thereof or tools or equipment as the contractor may furnish or rent from others, not to exceed the rates approved by the contracting officer.

[fol. 151] The orders for materials and supplies were placed by the contractor, but the Government reserved the right to furnish any materials, construction, equipment, machinery, or tools necessary for the completion of the work, and to pay directly to the persons concerned all sums due from the contractor for labor, materials, freight charges and other charges.

With respect to the payment of costs, the contract provides that the Government will currently reimburse the contractor upon certification to and verification by the contracting officer of the original papers governing pay-rolls for labor, invoices for materials, and other expenditures. Generally, reimbursements are to be made weekly, but may be made more frequently if conditions warrant.

The contract further provides that title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work, or at an approved storage site, and upon inspection and acceptance in writing by the contracting officer, title to all materials, tools, machinery, equipment and supplies, for which the contractor shall be entitled to reimbursement, is to vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the contractor from any duties imposed under the terms of the contract.

It is further provided by the contract that the contracting officer is authorized at any time to make changes in or additions to the drawings and specifications, to issue additional instructions, require additional work or to direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work, or in time required for its performance, an equitable adjustment of the amount of the fixed fee to be paid to the contractor shall be made, and the contract shall be modified in writing accordingly. It

is also required by the contract that, unless the contracting officer shall waive in writing the requirement, the contractor shall reduce to writing every contract in excess of \$2,000 made by him for the purpose of the work for services, materials, supplies, machinery, or equipment: insert therein a provision that such contract is assignable to the Government: make all contracts in his own name, and not bind or purport to bind the Government or the contracting officer; and make or place no purchases in excess of \$500 [fol. 152] without the prior approval of the contracting officer.

That the contractor shall keep records and books of account, showing actual cost to him of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of the contract, and that the contracting officer shall at all times be afforded proper facilities for inspection of the work, and shall at all times have access to the premises, work, materials, books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to the work.

The contract further provides that the contractor shall be reimbursed for payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of the contract to pay on or for any plant, equipment, process, materials, supplies or personnel; and, subject to advance approval by the contracting officer, permit and license fees, and royalties on patents used, including those owned by the contractor.

Under the terms of the contract the contractor shall take advantage of all such benefits as cash and trades discounts, rebates, allowances, credits, salvage, commissions, etc., and that in determining the actual net cost of articles and materials, such benefits shall be deducted from the gross cost thereof.

The record contains in substance the following stipulation of facts: Prior to January 1, 1941, a proposal was submitted by King and Boozer in writing to the contractor to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by the contractor of his contract with the Government of September 9, 1940. This proposal was submitted by the contractor to the con-

structing quartermaster, the authorized representative of the contracting officer at Fort McClellan for his approval and was approved by him. It was stipulated and agreed that all of the sales by King and Boozer of tangible personal property which are involved herein were made in connection with the performance by the contractor of his contract of September 9, 1940, and that the property was sold, [fol. 153] paid for, and reimbursement made therefor in the manner stated hereinafter with respect to a particular purchase made on January 17, 1941.

Pursuant to the proposal submitted by King and Boozer, the contractor, on January 16, 1941, prepared and submitted to the constructing quartermaster a request for the purchase of certain lumber, and requested the approval by the constructing quartermaster of the purchase. The approval of the constructing quartermaster was endorsed on the request for purchase. Thereafter, on January 17, 1941, the contractor submitted to King and Boozer at Anniston, Alabama, an order for the lumber. As shown by a copy of the order, it was signed by the purchasing agent of the contractor and directed that the materials described in the order should be shipped to the United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company, f. o. b., Fort McClellan. The order further provided as follows:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This purchase order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

"Terms of Payment as stated on obverse side of this purchase order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed bills of lading (or shipping papers) and receipt of certified invoice."

The purchase order further provided that bills of lading, etc., must read "United States Constructing Quartermaster at Fort McClellan, Alabama. Account of Dunn Construction Company, Inc., and John S. Hodgson and Company."

The purchase order also provided that copies of the invoice should be properly filled out and certified as follows:

[fol. 154] "I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; and that state or local sales taxes are not included in the amounts billed."

Upon receipt of the purchase order, King and Boozer loaded at its plant or principal place of business at Anniston, Alabama, the material ordered upon trucks operated by a contract carrier engaged by it for the purpose of transporting the lumber from its place of business at Anniston to a designated point within Fort McClellan. At the time King and Boozer loaded the lumber upon the trucks of the contract carrier, the materials were checked and inspected and two reports were made. One report was required to be made by the constructing quartermaster and was signed by an employee of the contractor and by an employee of the United States representing the constructing quartermaster. The other report was a report made to the contractor, and was signed by an employee of the contractor and by an employee of the United States representing the constructing quartermaster.

On January 18, 1941, King and Boozer delivered to the contractor an original invoice on account of the purchase of materials described in the purchase order of January 17, 1941. On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the constructing quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor of the invoice. On January 29, 1941, the constructing quartermaster approved the invoice for payment. Thereafter, but prior to February 3, 1941, the contractor issued his check to King and Boozer in full payment of the invoice mentioned above, in the amount of \$68.23, being the amount of \$68.40 less one-fourth

of one percent. discount, which check upon presentation was paid in due course.

[fol. 155] Thereafter, on February 3, 1941, the contractor submitted a voucher to the United States War Department, through the constructing quartermaster at Fort McClellan for reimbursement for expenditures by it aggregating \$1,991.62, including its expenditure of \$68.23 made to King and Boozer as stated above. This voucher did not include any amount for Alabama sales taxes, no such tax having been paid by the contractor or by King and Boozer.

The field auditor of the constructing quartermaster and the constructing quartermaster approved the voucher for payment, and on February 5, 1941, the voucher was paid by the finance officer at Fort McClellan to the contractor by the United States Government's check.

In submitting for payment the voucher mentioned above, the contractor attached thereto its request made to the constructing quartermaster for approval of the purchase, bearing approval of the constructing quartermaster for the purchase, copies of its purchase order to King and Boozer, the two receiving and inspection reports, and the invoice of King and Boozer.

It was further stipulated that in the performance of the contract between the contractor and the Government, in some instances not involved in the assessment hereinabove mentioned, competitive bids for the material required for the performance of the contract* were called for by the quartermaster general of the United States with respect to various materials to be used in such performance, and that after the acceptance of one of the bids received in response to the call, the quartermaster general informed the constructing quartermaster and the contractor of such acceptance and requested or directed the contractor to purchase the materials from the competitive bidder for and in connection with the performance of the contractor's contract with the United States, which purchase was thereafter handled in the same manner as if the bid had been originally submitted to the contractor, and the materials were paid for by the contractor and bills for reimbursement were thereafter submitted, approved, and paid to the contractor in the same manner as in the case of the typical transaction hereinabove mentioned and described in detail. [fol. 156] It was further stipulated that Fort McClellan is located upon and constitutes an area situated in Calhoun

County in the State of Alabama, acquired by the United States of America in 1918 by purchase from the individual owners of such land; that since such acquisition thereof the United States has continuously used the area as a military reservation or fort; and that all of the buildings and improvements mentioned in the contract of September 9, 1940, were constructed or required to be constructed upon the area known as Fort McClellan.

It was stipulated and agreed that the constructing quartermaster at Fort McClellan was a representative at Fort McClellan of the contracting officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the constructing quartermaster was duly authorized to act for and on behalf of the United States and the contracting officer in all matters pertaining to the contract of September 9, 1940, between the United States and Dunn Construction Company, Inc., and John S. Hodgson and Company.

There was the further stipulation that King and Boozer had billed Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes, or for a sum equal to the amount of the taxes, assessed against King and Boozer which are involved in the present case, but which have not been paid.

The questions presented for decision are:

(1) Whether the purchases involved herein were made by or on behalf of the United States or by an agency or instrumentality of the United States, and, if so, whether such purchases are constitutionally immune from taxation by the State of Alabama under Act No. 18 of General Acts of Alabama of 1939 (page 16)?

(2) Whether the United States, in the construction contract here involved, consented to the imposition of sales taxes by the State of Alabama?

[Vol. 157] (3) Whether the State of Alabama possessed the territorial jurisdiction to impose the taxes here involved, dependent (a) upon whether the sales in controversy were consummated upon the area known as Fort McClellan, and (b) upon whether the Congress in Public No. 819, 76 Congress, approved October 9, 1940, expressly released and waived exclusive jurisdiction over Camp McClellan in so far as the transactions here in controversy are concerned?

(4) Whether the sales in controversy are exempted from tax by section V of Act No. 18 of the General Acts of Alabama of 1939 (page 16) ?

The contract between the Government and the contractor was authorized by an Act of Congress, providing for the national security and the acquisition of facilities and weapons of defense. Public 703, 76th Congress, approved July 2, 1940.

The General Act No. 18, General Acts of Alabama of 1939, (page 16) provides:

"Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent. (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. * * *

"Section V. Exemptions: There are however exempted from the provisions of this Act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

[fol. 158] The nature of the tax is not determined by the name given to it, or by the use of some particular form of words, but by the substance and realistic impact of the tax; and while the tax here involved is denominated in section II as a privilege or license tax upon every person engaged in the business of selling tangible personal property at retail, determined by a stated percentage of gross proceeds

of sales, section XXVI makes it unlawful for any person to fail or refuse to add to the sales price and collect from the purchaser the amount due on the tax. The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax.—*Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. 465, 175 So. 399; *Long v. Roberts*, 234 Ala. 570, 176 So. 213; *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360; *McPhillips M'f'g Co. v. Curry*, 2 So. (2d) 600. See, also, *McCallen Co. v. Massachusetts*, 279 U. S. 620; *New Jersey Tel. Co. v. Tax Board*, 280 U. S. 338; *Educational Films Corp. v. Ward*, 282 U. S. 378-387; *Lawrence v. State Tax Commission*, 286 U. S. 276; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435.

There is no doubt but that a sale of material to the Government to be used in promoting its governmental enterprises can not be made the basis of a state sales tax.—*Panhandle Oil Co. v. Mississippi*, ex rel. *Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857; *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, 80 L. ed. 1236.

In the *Panhandle Oil Company* case, *supra*, it is said that the State "may not lay any tax upon the transactions by which the United States secures the things desired for its governmental purposes." As to the case of *Graves v. Texas Company*, *supra*, this Court had held that the gasoline tax then in existence laid on a "storer" was due and payable when it was withdrawn from storage, and was measured by the amount so withdrawn.—*State v. City of Montgomery*, 228 Ala. 93, 151 So. 856. In the *Graves* case, *supra*, the minority of the United States Supreme Court held that the tax event had fully matured when there was a withdrawal from storage, and was then due and payable [fol. 159] by the storer, though it was sold to the United States for governmental purposes and could be passed on to the Government in the sale. But the majority of that court held that such a tax on storing and withdrawing is upon something essential to a sale to the United States and is as objectionable as it would be on the sale itself to the United States. This is of course upon the settled principle that neither the United States nor its instrumentalities which are engaged in carrying on its powers, can be taxed by a state so as to burden the Government directly or immediately.

It is true that sometimes a taxable event occurs of a local sort which has close and intimate relations to interstate commerce and on which a state may levy. But this is on the theory that interstate commerce must "pay its way," so that local transactions in close relation to such commerce may be locally taxed without discrimination, if such an event is not subject to a local tax in some other sovereignty. The prohibition of a state to tax interstate commerce is considered to exist only when such taxation interferes with that commerce, and should not be extended beyond the necessity of keeping interstate commerce free from interference.—*Cloverdale v. Ark-La Pipe Line Co.*, 303 U. S. 604, 58 S. Ct. 736; *So. Pac. Rwy. Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389; *Western Livestock Co. v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546.

But the United States is not under the principle of "paying its way" in respect to taxation. And while there may be a local taxable event in the continuous flow of commerce between the states, there can not be a distinct taxable event in the continuous flow of circumstances by which the Government acquires the thing desired for its purposes. The imaginary contemplation of such event applicable to interstate commerce does not exist, because such commerce may be burdened so long as it is not interfered with, whereas no burden can be directly laid upon the activities of the Government. But this does not prohibit the levy by a state of nondiscriminatory taxes on the machinery, equipment and gasoline used by an independent contractor in the performance of his contract with the Government.—*Trinity Farm Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, 78 L. ed. 918.

[fol. 160] It is said that there is no exact formula applicable to all cases where an instrumentality is used by the Government, by which to determine whether it is immune from taxation on this principle. But if it is of such character as to be intimately connected with the exercise of a power or the performance of a duty by the Government, any taxation of it by a state which would be a direct interference with the functions of the Government would be plainly beyond the taxing power.—*Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384.

This does not inhibit the laying of a tax by a state on the income of an agent, officer, employee, or other instrumentality of the Government, which he may derive from

such employment, and which has come into his personal ownership free from Government control in connection with such agency.—*Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 929, 120 A. L. R. 1466; *Western Rwy. Co. v. State*, MSS.

And the fact that in his or its relations with the Government, the burden of the anticipated tax may be passed on economically to the Government through its effect on the price level of labor and material, is but a normal incident of the situation.—*Graves v. New York, ex rel. O'Keefe*, *supra*.

But when the incidence of the tax, as such, falls directly upon the Government to the extent that it is required to pay a tax in that form to the State, arising from the nature of its contract, the situation is different from one in which such tax is hidden in the price levels, and loses itself as a tax as where it is but a part of the overhead and other factors which enter into the fixation of such prices.

The contractor here was acting for the Government in the accomplishment of a governmental purpose. His acts were all under the immediate and direct supervision of the governmental authorities. His contract partakes of the nature in some respects of an independent contractor, and in some of an agency of the Government. It is not necessary here to define the exact status in respect to all his dealings, whether an independent contractor or an [fol. 161] agency under employment of the United States. The question here is whether a sales tax is in essence laid on a transaction by which the United States secures the things desired for governmental purposes. The title to the material went immediately into the United States and this was accomplished in a single transaction. The contractor did not buy nor sell, as a dealer, on his own account.—12 *Corpus Juris Secundum* 8, Section 2.

The transactions of a broker may by contract be such as that the title of the property will or will not pass through him (though usually it does not), and he may by contract collect from the consumer; but he does not deal on his own account.—12 *Corpus Juris Secundum* 74, Section 29; 9 *Amer. Jur.* 1013, Section 54, page 1014, Section 56. The incident in his relations most important in determining his status is whether he is dealing for himself or for another.—12 *Corpus Juris Secundum* 8, section 2. An independent building contractor is usually dealing on his

own account, and the materials and supplies remain in his ownership until they are affixed to the land. But by agreement the materials may become the property of the owner before they are affixed to the land.—17 Corpus Juris Secundum 1110, 1111, Section 516; 9 Corpus Juris Secundum 732, section 71.

So that whether this contractor as to the materials, occupies a status similar to that of a broker, or of an independent contractor, is not controlled by the circumstances that he pays for it in the first place, or that the title immediately passes to the Government without any stoppage in him for any purpose.

Under the contract here involved, the Government was to, and did, acquire the title to the things desired for its governmental purposes. The contractor took for the Government an essential step in the transaction by which such title was acquired. The contractor was not acting for himself in doing so, though he was in name the purchaser, and though indebted for the agreed price. He had no power of disposition of the property, but to use it on this project. He did not use it as his own property, but as the property of the Government, which was to pay him the exact amount of its purchase price which he paid, or was obligated to pay. He could not make a charge for it of an amount in excess of its cost to him. His only interest [fol. 162] in the material was that its quality and amount (perhaps its price, if over \$500) was to be satisfactory to the Government.

Article II (m) of the contract here involved, dealing with the reimbursement of the contractor for his expenditures, provides as follows:

“Payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of this contract to pay on or for any plant, equipment, process, materials, supplies, or personnel; and, subject to advance approval by the contracting officer, permit and license fees, and royalties on patents used, including those owned by the contractor.”

The State of Alabama contends that by this provision of the contract, the Government consented to the imposition of the tax which is involved in this case. This provision of the contract relates only to the reimbursement

of the contractor for applicable State taxes which the contractor may be required to pay. It does not deal with the waiver of any immunity of the Government; and there is no indication of a purpose to acquiesce in the levying of improper or invalid taxes.

The contracting officer could not waive the immunity. The Supreme Court of the United States in the recent case of *The Royal Indemnity Co. v. United States*, 61 S. Ct. 995, speaking through Mr. Justice Stone, now Chief Justice, said: "Power to release or otherwise dispose of the rights and property of the United States is lodged in Congress by the Constitution.—Article IV, section 3, cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress, or as it is implied from other powers so granted."

The further argument is, that bill H. R. 8438, relating to appropriations for the Navy Department for the fiscal year 1941 contained a provision authorizing the use of the cost-plus fixed-fee contracts. To the bill, the Senate added an amendment, No. 120, providing that all contractors who enter into cost-plus fixed-fee contracts shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purposes of such contracts, and that all purchases under such contracts shall be exempt from federal, state and local taxes. The [fol. 163] amendment was defeated in the House (Cong. Record, Vol. 86, part 7, pp. 7532-35), and the Senate concurred (Cong. Record, Vol. 86, part 7, p. 7648).

The Acts of Congress under which the contract here involved was amended, were enacted on June 13, 1940, and July 2, 1940, subsequent to the defeat of Senate amendment No. 120 to the Navy Appropriations Bill, and the State contends that Congress was aware of the tax reimbursement provisions in the cost-plus fixed-fee contract at the time of the adoption of these acts, and in expressly authorizing such form of contract, including such provision, Congress approved the tax clause therein and intended to permit the contractor to pay State taxes. In other words, such action by the Congress waived the tax immunity of the Government and its instrumentalities.

The Congress has the power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions. But, as was said in

the case of *Austin v. The Alderman*, 7 Wall. 694, "The waiver must be clear, and every well grounded doubt upon the subject be resolved in favor of the exemption." See, also, *Farmers Bank v. Minnesota*, 232 U. S. 516.

There can be no doubt but that the immunity exists if the purchases here involved were made by the Government or its agents or instrumentalities. The mere silence of Congress on the question of immunity of cost-plus fixed-fee contracts falls far short of being a waiver of the long established tax immunity of the Federal Government and its instrumentalities.

The conclusion is inescapable that the burden of the tax in the instant case falls directly and immediately upon the Government. The addition of the tax raises the cost of construction which the Government is bound to pay. It in no wise affects the fixed fee of the contractor. This is so irrespective of the agreement to pay applicable taxes.

In view of the foregoing, other questions presented are not here discussed, as they are unnecessary to a decision in this case.

Reversed and rendered.

Gardner, C. J., Thomas, Bouldin and Foster, JJ., concur. [fol. 164] Brown, J., dissents, being of the opinion the decree of the lower court is correct and should be affirmed.

Knight, J., not sitting.

DISSENTING OPINION

BROWN, Justice (dissenting):

The material—lumber—in question was sold by the appellants, King and Boozer, to Dunn Construction Company, Inc., and John S. Hodgson and Company, independent contractors under contract with the United States to construct buildings at Camp McClellan, near Anniston, Alabama. The contract between said contractors and the United States provides: "That the contractor *shall furnish* all labor, *material*, tools, machinery, equipment facilities and supplies necessary for the completion of the work."—[Italics supplied.]

General Act No. 18, General Acts of Alabama, 1939, page 16, levies the tax, not on the government or its instrumentalities, but on persons engaged in the business of selling,

and the tax is merged into the price, as a part thereof.—*Lone Star Cement Corporation et al. v. State Tax Commission et al.*, 234 Ala. 465, 175 So. 399.

While it is true that the purchaser—consumer—ultimately pays the tax, that is true of all taxes which are added in as overhead expense in doing business.

The tax is not levied on the material—the lumber—nor on the title thereof, but on the privilege of selling and if the seller does not include the tax in the price of the sale, he alone is liable. The levy affirmed by the Circuit Court was against, King and Boozer, not against the government.

The mere fact that the material goes into government buildings, does not convert the statute into a levy against the United States. The liability for the tax is fixed when the sale is made, and the lumber in the instant case was delivered at the place of intended use to the account of the contractor.

In my opinion the Circuit Court did not err in affirming the levy, and the judgment should be affirmed.

I therefore, respectfully dissent.

[fol. 165] IN SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY OF DECREE

To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of Alabama:

Comes The State of Alabama, Appellee in the above styled cause, and respectfully shows unto this Court as follows:

1. That on the 29th day of July, 1941, this Court, in the above styled cause, rendered an opinion and entered a final decree reversing the decision and decree of the Circuit Court of Montgomery County, Alabama, In Equity, and rendering a final decree in said cause in favor of Appellants and against this Petitioner.

2. That this Petitioner, being dissatisfied with said final decree, desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to be directed

to this Court ordering and directing that the record in this case be certified to it for the purpose of reviewing the same.

3. That said Petitioner is allowed by law three (3) months after the entry of said final decree on the 29th day of July, 1941, in which to make application for such writ.

Wherefore, Petitioner prays that a stay of said decree and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, be [fol. 166] granted by this Court for the purpose of allowing the Petitioner to apply for and obtain such writ; and the Petitioner further prays that the issuance of the certificate to the Circuit Court be stayed during said period, and that if the same has already issued, that it be recalled by this Court.

(Signed) Thomas S. Lawson, Attorney General;
John W. Lapsley, Assistant Attorney General; J.
Edward Thornton, Assistant Attorney General,
Attorneys for Petitioner.

. Petition filed and granted this the 2nd day of August, 1941, without bond or security. It is, therefore, ordered that said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the
Supreme Court of Alabama.

I hereby certify that I have this the 2nd day of August, 1941, mailed a copy of the foregoing petition and order, postage prepaid, to Fred L. Blackmon, Esquire, Anniston, Alabama, Samuel O. Clark, Jr., Esquire, Department of Justice, Washington, D. C., Thomas D. Samford, Esquire, Montgomery, Alabama, Attorneys of record for Appellant.

(Signed) John W. Lapsley, Assistant Attorney General.

[fol. 167] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING DECREE—August 2, 1941

Comes the Petitioner, State of Alabama, by its Attorneys, and the Petition praying that a stay of the decree of the Supreme Court of Alabama and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable Petitioner to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States, and further praying that the certificate to the Circuit Court, In Equity, be recalled pending application for Writ of Certiorari to the Supreme Court of the United States, being duly examined and understood, it is considered and ordered that the Petition be and the same is hereby granted without bond or security. It is therefore ordered that the said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the
Supreme Court of Alabama.

[fol. 168] IN SUPREME COURT OF ALABAMA

CERTIFICATE OF RECALL PENDING APPLICATION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Register of the Circuit Court of Montgomery
County, Greeting:

Whereas, in the matter of King and Boozer, Appellant, v. State of Alabama, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Circuit Court of Montgomery County, our Supreme Court did on the 29th day of July, 1941, render a decree of Reversal and Rendition in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter a Petition to stay the decree and the execution and enforcement thereof was filed in this Court on the 2nd day of August, 1941; said Petition being granted on said date.

Now, it is hereby certified, that our Supreme Court, or one of the Justices thereof, did, on the 2nd day of August, 1941, order that said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you, pending application for Writ of Certiorari to the Supreme Court of the United States.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 4th day of August, 1941.
(Signed) J. Render Thomas, Clerk of the Supreme Court of Alabama.

[fol. 169] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: Enter Thos. S. Lawson. File No. 45,930, Alabama, Supreme Court, Term No. 602. State of Alabama, Petitioner, vs. King and Boozer, a Partnership Composed of Tom Cobb King and Simon Elbert Boozer, and United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941. Term No. 602, O. T. 1941.

[fol. 170] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY, PARTNERS DOING BUSINESS AS DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY, PARTNERS DOING BUSINESS AS DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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[fol. 1]

[Caption omitted]

[fol. 2]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

**UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and John S. Hodgson and Company, Partners
Doing Business as Dunn Construction Company, Inc.,
and John S. Hodgson and Company, Plaintiffs,**

v.

**John C. Curry, Individually and as Commissioner of
Revenue of the State of Alabama, Defendant**

PETITION FOR DECLARATORY JUDGMENT—Filed May 16, 1941

To the Honorable Judges of the Circuit Court of Montgomery County, Sitting in Equity:

Comes now the United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company, and file this their petition for a declaratory judgment and respectfully shows unto the Court as follows:

1. The plaintiff, the United States of America, is a corporation sovereign and body politic.

2. The plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, are a partnership consisting of Dunn Construction Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and John S. Hodgson and Company, an Alabama partnership consisting of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham in the State of Alabama.

3. The plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting of Dunn Construction Company, Inc., and John S. Hodgson and Company, with their principal place of business at Anniston, in the State of Alabama, are and have been engaged for and on behalf of the United States as an agency and in-

strumentality of the United States in the construction of a complete tent camp, necessary buildings, temporary structures, utilities and appurtenances thereto for the United States of America at Camp McClellan, in the State of Alabama, under the provisions and requirements of the contract entered into by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, with the United States of America, a true and certified copy of which is attached hereto marked Exhibit "C" and prayed to be read as a [fol. 3] part hereof, said contract provides that the cost of performing and executing the same, including the purchase of all materials necessary therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the plaintiff the United States of America and reimbursement therefor made by the United States of America to the plaintiffs Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid.

4. The defendant, the Honorable John C. Curry, is Commissioner of Revenue of the State of Alabama.

5. On May 8, 1941, the State Department of Revenue of the State of Alabama, as will appear from a copy of a minute entry of the State Department of Revenue, which is attached hereto marked Exhibit "A" and prayed to be read as a part hereof, determined pursuant to Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, and upon information in the possession of the State Department of Revenue that for the quarterly period beginning January 1, 1941, and ending March 31, 1941, the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, had made purchases of tangible personal property during the said quarterly period which it is alleged is subject to the tax imposed by Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, and computed and determined the amount of tax due by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, for the said period as follows:

Item 1. Total sales price of tangible personal property purchased by said Taxpayers outside of Alabama or in interstate commerce, for storage, use or consumption by said Taxpay-

ers in this State, upon which the seller has not collected from said Taxpayers the use tax (not including purchases of automotive vehicles) \$2,313.17

Item 4. Total amount remaining as measure of tax \$2,313.17

Item 5. Amount of tax (2% of Item 4) \$46.26

Item 6. Plus 10% penalty upon \$——..... \$4.63

Item 7. Plus interest at the rate of $\frac{1}{2}$ of 1% per month, or fraction thereof, from the 20 day of April, 1941 to the 8 day of May, 1941, upon the tax as herein computed and determined \$.23

Item 8. Total tax, penalty, and interest thereon
due to the 8 day of May, 1941..... \$51.12

[fol. 4] 6. Based upon such computation and determination the State Department of Revenue ordered, as will appear from the minute entry attached hereto as Exhibit "A", that the amount of tax determined be assessed against the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as and for the amount of tax due by them under the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, together with \$4.63 penalty thereon and interest upon the amount of said tax at the rate of $\frac{1}{2}$ of 1% per month or fraction thereof from the 20th day of April, 1941, and that written notice of the assessment be given to the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as required by the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96.

7. On May 8, 1941, the State Department of Revenue, by John C. Curry, Commissioner of Revenue, delivered to the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, a copy of the minute entry and assessment mentioned and described

and fully set out in the minute entry, a copy of which is attached hereto as Exhibit "A", at which time the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, acknowledged receipt of the copy of the assessment above mentioned and described and waived any further or other notice thereof.

8. On May 8, 1941, upon the demand of the State Department of Revenue, and of John C. Curry, Commissioner of Revenue, for the payment of tax so determined to be due and assessed against the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, in the sum of \$46.26, together with \$4.63 penalty and 23¢ interest from the 20th day of April, 1941, as assessed by the State Department of Revenue in the minute entry of the State Department of Revenue, a copy of which is attached hereto as Exhibit "A" and prayed to be read as a part hereof, the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, paid to the State Department of Revenue and John C. Curry, Commissioner of Revenue, the sum of \$51.12, being the sum of \$46.26, as fixed by the assessment of May 8, 1941, with a penalty of \$4.63 and interest thereon from April 20, 1941, in the amount of 23¢. Such payment was made by plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, and accepted by [fol. 5] the State Department of Revenue and John C. Curry, Commissioner of Revenue, under protest duly verified. A copy of such protest and acceptance thereof by the State Department of Revenue is attached hereto marked Exhibit "B" and made a part hereof as fully as if set out herein.

9. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales price of tangible personal property purchased outside the State of Alabama consisting of roofing materials purchased by the plaintiff, the United States, or by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States and in connection with their

performance of their contract with the United States, a copy of which is attached hereto marked Exhibit "C" and prayed to be read as a part hereof as fully as if set out herein, and used or consumed by the United States through these plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States, in and about the construction by them for and on behalf of the United States of certain buildings, warehouses and other camp and military facilities under the plaintiffs', Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, contract with the United States at Camp McClellan near Anniston, Alabama. Plaintiffs' allege that the transactions and activities of the agents and instrumentalities of the United States entered into for and on behalf of the United States are immune from taxation by the State of Alabama under the constitution of the United States of America fully as much as are the transactions and activities of the United States itself, and further specifically allege that property purchased by the United States, its agencies and instrumentalities, and the storage use or other consumption of property by the United States, its agencies and instrumentalities are immune under the Constitution of the United States of America from the tax imposed by Act No. 67, General Acts of Alabama, Regular Session, 1939, p. 96.

10. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales price of tangible personal property purchased by the plaintiff, the United States, or by the plaintiffs, Dunn Construction Company, [fol. 6] Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States, without the State of Alabama, but for and on behalf of the United States and delivered to the United States at Camp McClellan, Anniston, Alabama, and the plaintiffs allege tangible personal property so purchased by the United States through its agents or instrumentalities is exempt from the tax imposed by Act No. 67 of the General Acts of Alabama, Regular Session, 1939, under Subsection B of Section 3 of that Act.

11. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales price of tangible personal property purchased outside the State of Alabama by the plaintiff, the United States or by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States but for and on behalf of the United States and delivered to the United States at Camp McClellan, Anniston, Alabama, which is within an area within the exclusive jurisdiction of the United States and the plaintiffs allege that such purchases and the storage, use or other consumption of such property are immune from taxation by the State of Alabama under the Constitution of the United States of America, and further allege that the State Department of Revenue is applying the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, to the storage, use or other consumption of the property so made by the United States or on its behalf by its agents and instrumentalities have applied the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, in a manner and with a result violative of the Constitution of the United States of America.

12. Plaintiffs allege that the purchase, storage, use or other consumption of the roofing material, above described, was by the plaintiffs, the United States of America, or by the plaintiffs, the Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States for and on behalf of the United States and was in fact the purchase, storage, use or other consumption by the United States, the taxation of which by the State of Alabama is taxation of the United — by the State of Alabama and violative of the Constitution of the United States of America.

[fol. 7] 13. Plaintiffs allege that Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, insofar as it applies to the storage, use or other consumption of property by the United States or by the agents and instrumentalities of the United States consummated or

entered into by them and for and on behalf of the United States is violative of the Constitution of the United States of America.

14. Plaintiffs allege that a controversy exists between the defendant and the plaintiffs as to whether the plaintiffs are exempt from taxation under Act No. 67 of the General Acts of Alabama, Regular Session 1939, p. 96, and immune from taxation by the State of Alabama under the Constitution of the United States of America and that such controversy exists not only with respect to tangible personal property which furnishes the basis for the assessment made by the State Department of Revenue for the period January 1, 1941, to March 31, 1941, but with respect to similar tangible personal property and other tax periods prescribed by Act No. 67 of the General Acts of Alabama, Regular Session, 1949, p. 96.

Wherefore, Premises Considered, the plaintiffs pray that this Court will take jurisdiction of this action, that the Honorable John C. Curry, Individually and as Commissioner of Revenue, be made a party defendant to this bill and that process issue to him hereunder in accordance with the rules and practice of this Court. And plaintiffs further pray that this Honorable Court will, upon hearing, render a declaratory judgment and decree determining that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, are not liable for the taxes assessed by the defendant and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, on May 8, 1941, and that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, are entitled to a refund of the tax paid by them, as aforesaid, together with the penalty and interest thereon as may be appropriate and which to this Honorable Court may seem meet.

Samuel O. Clark, Jr., Assistant Attorney General;
Thomas D. Samford, United States Attorney, Attorneys for Plaintiffs,

[fol. 8]

EXHIBIT "A" TO BILL

MINUTE ENTRY

Consumer's Use Tax Assessment

STATE OF ALABAMA

V.

DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON
AND COMPANY, Taxpayers

Whereas, Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter called Taxpayers) having neglected or refused to make a return as required by the Alabama Use Tax Act, approved February 28, 1939 (Act No. 67 of the General Acts of Alabama, Regular Session, 1939 p. 96), for the quarterly period beginning January 1, 1941, and ending March 31, 1941, showing the amount of the total sales price of tangible personal property purchased by the said Taxpayers, the storage, use, or consumption of which properly is subject to the tax imposed by said Act; and

Whereas, based upon information in its possession, and as authorized by said Act, the State Department of Revenue has estimated upon said information the amount of the total sales price of tangible personal property purchased by said Taxpayers so far as is known to the State Department of Revenue for said quarterly period, the storage, use, or consumption of which in this State is subject to the tax imposed by said Act, and based thereon has computed and determined the amount of said tax due thereon by said Taxpayers for said period, as follows:

Item 1. Total sales price of tangible personal property purchased by said Taxpayers outside of Alabama or in interstate commerce, for storage, use or consumption by said Taxpayers in this State, upon which the seller has not collected from said Taxpayers the use tax (not including purchases of automotive vehicles) \$2,313.17

Item 2. Deductions:

(a) Purchase price of tangible personal property for resale (included in Item 1) \$

(b) Purchases not subject to tax:

Gasolene, oil and grease.....	\$.....	
Item 3. Total deductions (Total of Item 2.....)	\$.....	
Item 4. Total amount remaining as measure of tax		\$2,313.17
Item 5. Amount of tax (2% of Item 4)	\$	46.26
[fol. 9] Item 6. Plus 10% penalty upon \$—	\$	4.63
Item 7. Plus interest at the rate of $\frac{1}{2}$ of 1% per month, or fraction thereof, from the 20 day of April, 1941, to the 8 day of May, 1941, upon the tax as herein computed and determined .....	\$	.23
Item 8. Total tax, penalty, and interest thereon due to the 8 day of May, 1941	\$	51.12

It is, Therefore, Ordered by the State Department of Revenue that Forty-six & 26/100 Dollars (\$46.26) be and it is hereby assessed against said Taxpayers as and for the amount of use tax due by them under the provisions of said Use Tax Act, together with Four & 63/100 Dollars (\$4.63) penalty thereon, and interest upon the amount of said tax at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the 20 day of April, 1941; and that written notice of this assessment be given to said Taxpayers, as required by the provisions of said Act.

Dated this the 8 day of May, 1941.

State Department of Revenue, by (S.) John C. Curry,
Commissioner of Revenue. (S.) Julia Klinge,
Secretary. (Seal.)

We, the undersigned, hereby acknowledge receipt of a copy of the foregoing assessment, and waive any further or other notice thereof.

This the 8th day of May, 1941.

(S.) Dunn Const. Co., Inc., and John S. Hodgson &
Co., by (S.) John S. Hodgson, Partner.

EXHIBIT "B" TO BILL

PROTEST OF PAYMENT OF USE TAX

To the State Department of Revenue:

Comes now Dunn Construction Company, Incorporated, and John S. Hodgson and Company, a partnership, and pays herewith under protest the tax exacted of it by the

State Department of Revenue as use tax for the period beginning January 1, 1941 and ending March 31, 1941, in the amount of \$51.12 including penalties and interest as fixed by final assessment of the State Department of Revenue dated May 8, 1941, purporting to have been made under [fol. 10] authority of the provisions of the Alabama Use Tax Act, approved February 28, 1939 (General Acts, Regular Session 1939, p. 96); this payment being made under compulsion to avoid seizure and sale of the property of the taxpayer and with notice to the State Department of Revenue that the taxpayer intends to and will test the legality and validity of such assessment and the collection of this payment and will attempt to secure refund of such payment by appropriate legal proceedings.

The grounds of this protest are as follows:

1. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use or consumption of tangible personal property which is immune from taxation by the State of Alabama under the Constitution of the United States.

2. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use and consumption of tangible personal property of the United States by the United States, and such storage, use and consumption is solely by the United States and immune and except from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama.

2. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use and consumption of tangible personal property exempt from taxation under subsection (b) of Section III of Act No. 67 of the Legislature of Alabama, session of 1939 as approved February 28, 1939, as it appears in General Acts Alabama Regular and Special Session 1939 at page 96.

4. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use or consumption of property by the United States of property of the United States, the owner-

ship, storage, use and consumption of which is not subject to taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama.

5. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use and consumption of personal property of the United States by an agent and instrumentality of the United States and immune from taxation under the Constitution of the United States and the Statutes of Alabama.

6. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use and consumption of tangible personal property, not occurring within the taxing jurisdiction of the State of Alabama.

[fol. 11] 7. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon the storage, use or consumption of tangible personal property of the United States by the United States which is immune from taxation by the State of Alabama.

8. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon or with respect to the storage, use or consumption of property purchased by the United States and stored, used or consumed by the United States all of which are immune from taxation by the State of Alabama under the Constitution of the United States and the Statutes of Alabama for the reason that said assessment was of or on account of storages, uses and consumption by the United States exclusively.

9. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment is made upon purchases, storages, uses and consumptions of personal property by the United States made by it through the protestants as its agent and instrumentality, whose purchases, storages, uses and consumptions were for and in behalf of the United States exclusively.

10. The assessment of May 8, 1941, above mentioned is illegal and void for the reason that said assessment and the use taxes exacted thereunder constitute a direct and unconstitutional burden upon the United States.

This 7th day of May, 1941.

Dunn Construction Co., Inc., and John S. Hodgson
and Company, by (S.) John S. Hodgson.

STATE OF ALABAMA,
Calhoun County:

Before me, the undersigned authority in and for said County, in said State, personally appeared John S. Hodgson, who, being by me first duly sworn, deposes and says that he is a member of the firm of John S. Hodgson and Company, which firm is a co-venturer with the Dunn Construction Company, Incorporated, which co-venture is known as Dunn Construction Co., Incorporated, and John S. Hodgson and Company and that such officer has authority to sign the foregoing protest of payment of use tax and to make this affidavit; that he is cognizant of the facts; that he has [fol. 12] read the foregoing protest and that the allegations of fact therein are true and correct.

(S.) John S. Hodgson.

Sworn to and subscribed before me this the 8th day of May, 1941. ———, Notary Public. (Seal.)

Service of the foregoing protest and payment made thereunder received and accepted this 8th day of May, 1941.

State Department of Revenue, by (S.) John C. Curry,
Commissioner of Revenue. .

[fol. 13]

UNITED STATES OF AMERICA

War Department

Washington, May 13, 1941.

I hereby certify that I am the custodian of the files of the office of The Quartermaster General, War Department, and that the attached Contract No. W 6119 qm-161, dated September 9, 1940, with Dunn Construction Company, Inc., and John S. Hodgson and Company for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto, is a true copy of the contract in my custody in the Office of The Quartermaster General.

Agnes N. Kilmartin, Principal Clerk, Mail & Records
Branch, Office of The Quartermaster General.

I hereby certify that Agnes N. Kilmartin, who signed the foregoing certificate, is the Custodian of the files of the Office of the Quartermaster General, War Department, and that to her certification as such full faith and credit are and ought to be given.

In Testimony Whereof, I Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of May, 1941.

Henry L. Stimson, Secretary of War, by F. M. Hoadlay, Assistant Chief Clerk. (Seal.)

[fol. 14]

EXHIBIT "C" TO BILL

Contract No. W 6119 qm-161.
O. I. No. 70-41.

Cost-Plus-A-Fixed-Fee Construction Contract

War Department

Contractor Dunn Construction Company, Inc., and John S. Hodgson and Company, Birmingham, Alabama.

Fixed-fee, \$128,865.00.

Contract for construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto.

Place Fort McClellan, Alabama.

Estimated cost of project, \$3,204,588.00.

Payments to be made by Finance Officer at Fort McClellan, Alabama.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

QM 8047 P3-3211 A 0002.003-02.

(S.) M. B. Birdseye, Major, QMC.

This contract is authorized by the following laws:

Public No. 611—76th Congress, approved June 13, 1940.

Public No. 703—76th Congress, approved July 2, 1940.

This Contract, entered into this 9th day of September, 1940 by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Dunn Construction Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and John S. Hodgson and Company a partnership consisting of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham in the State of Alabama, hereinafter called the Contractors, witnesseth that:

Whereas, the Government desires to have constructed a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at Fort McClellan, Alabama.

Whereas, the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work:

Now, Therefore, the parties hereto do mutually agree as follows:

Article I. Statement of work

1. The Contractor shall, in the shortest possible time, furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp, including necessary buildings, temporary structures, utilities and appurtenances thereto and comprising 76 mess halls, 4 officers' quarters, 12 administration buildings, 2 fire stations, Post Office, 1 telegraph and telephone office, 10 Post Exchanges, service club, 7 recreation buildings, 8 infirmaries, utility shop, 14 motor repair shops, 8 storehouses, 15 warehouses, 1 gasoline storage, incinerator, bakery and equipment, laundry and equipment, cold storage building, 81 lavatory buildings, stockade fence; also a hospital unit with equipment consisting of administration building, 4 nurses' quarters, 2 officers' quarters, 3 mess halls, 6 barracks, 2 clinics, 1 Physiotherapy building, 14 wards, 3 storehouses, morgue, covered walks, service roads

and heating plant; also floors, framing and screening for 3205 tents and 1 theatre tent; also the installation of general utilities consisting of electric service, railroad, roads and walks, sewer, telephone and telegraph and water; also the grading and clearing necessary for preparation of the camp site. In accordance with the drawings and specifications or instructions contained in appendix "A" hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions.

It is estimated that the total cost of the construction work covered by this contract will be approximately Three Million Two Hundred Four Thousand and Five Hundred Eighty-eight Dollars (\$3,204,588.00), exclusive of the Contractor's fee, and that the work herein contracted for will be ready for utilization by the Government within one and one-half ($1\frac{1}{2}$) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of The Quartermaster General of the Army.

[fol. 16] In consideration for his undertaking under this contract the Contractor shall receive the following:

(a) Reimbursement for expenditures as provided in Article II.

(b) Rental for Contractor's equipment as provided in Article II.

(c) A fixed fee in the amount of One Hundred Twenty Eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses.

2. The Contracting Officer, may at any time, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue and additional instructions, require additional work, or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance an equitable ad-

justment of the amount of the fixed fee to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and, with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article XV hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

[fol. 17] 4. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.

5. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted sample has been approved by the Contracting Officer.

Article II. Cost of the Work

Reimbursement for Contractor's Expenditures

1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified

by the Contracting Officer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the Contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clamshell or other buckets, electric motors, electric drills, electric hammers, electric hoists, mechanical shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment exceeding \$300 in value as may be necessary for the proper and economical prosecution of the work. Each contract for the rental of construction plant or parts thereof by the Contractor from third parties shall be in a form prescribed by the Secretary of War, shall be subject to approval by the Contracting Officer, and shall contain the same provisions entitling the Government to acquire title to such plant or any part thereof upon the same conditions as those contained in paragraph 2 of Article II of this contract.

(d) Loading and unloading at the site of the work of construction plant, owned or rented by the Contractor; the [fol. 18] transportation thereof place or places where it is to be used in connection with said work, and return transportation f. o. b. cars to the point of original shipment or equivalent mileage, except as hereinafter set forth; the installation and dismantling thereof, and such repairs and spare parts as are not included in the rental; provided such repairs or spare parts are not made necessary by defects in such plant, or parts thereof, or by the fault or negligence of the Contractor or his employees; but charges for transportation of such construction plant over distances in excess

of 500 miles must have the written authorization of the Contracting Officer in advance.

(e) Transportation charges on materials and supplies.

(f) Transportation and traveling expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work; expenses of procuring labor and expediting the production and transportation of material and equipment. Expenditures under these items must have the written authorization of the Contracting Officer in advance.

(g) Salaries of resident engineers, superintendents, timekeepers, foremen, and other field employees of the Contractor in connection with the work. In case the full time of any field employee of the Contractor is not applied to the work his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's field organization, or as principal assistant to any such person, until there has been submitted to and approved by the Contracting Officer a statement of the qualifications and experience of the person proposed for such assignment. The regular salary or compensation rate of any such person shall not be in excess of the highest salary or compensation rate received by him during the year preceding the date of this contract plus such increase as the Contracting Officer may approve.

(h) Temporary rights in land required in connection with the work.

(i) Buildings and equipment required for necessary field offices, commissary, hospital and other facilities and the cost of maintaining and operating said offices, hospital and other facilities, including minor expenses such as telegrams, telephone service, expressage, and postage. The cost of maintaining commissary buildings and utility service therein will be reimbursed but the cost of all commissary operating [fol. 19] personnel and supplies will be borne by the Contractor. All commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Contracting Officer may prescribe.

(j) Premiums on such bonds and insurance policies as the Contracting Officer may require for the protection of the Government; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary, and other insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(k) Losses and expenses, ~~not~~ compensated by insurance or otherwise (including settlement made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable.

(l) The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor.

(n) Such portion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the Contractor as is actually incurred in connection with this work. Expenditures under this item must have the written authorization of the Contracting Officer in advance.

(o) When specifically approved in advance by the Chief of Branch, a reasonable allowance for work done in the Contractor's general offices exclusively for and directly chargeable to the work.

(p) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

(q) It is agreed that, unless otherwise authorized by the [fol. 20] Contracting Officer, all allowances as items of cost

on account of the work under this contract for travel expenses and subsistence provided for herein shall conform to the allowances authorized by the "Standardized Government Travel Regulations."

Rental for Contractor's Equipment

2. Rental shall be paid to the Contractor for such construction plant or parts thereof as he may own and furnish, at not to exceed the rates approved by the Contracting officer. Except as specified below, such rental shall begin on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment to the site of the work, as evidenced by the bill of lading covering such shipment, and shall terminate, unless title thereto passes to the Government at an earlier date, on the date of the delivery of such plant, or parts thereof, to a common carrier for shipment from the site of the work, as evidenced by the bill of lading covering such shipment, provided such plant, or parts hereof, are so delivered without delay after notice by the Contracting Officer to the Contractor that such plant or parts thereof, are no longer required; otherwise, the rental shall terminate on the date of such notice. If such plant, or any part thereof, is not in sound and workable condition when it arrives at the site of the work, the rental period therefor shall not begin until such plant, or parts thereof, shall have been placed in sound and workable condition at the expense of the Contractor and no rental therefor shall be paid for any prior period. If such plant, or parts thereof, cannot be placed in sound and workable condition, no transportation charges for the shipment thereof shall be included in the cost of the work or paid, either directly or indirectly, by the Government. Determination as to whether such plant, or parts thereof, are in sound and workable condition shall, in every instance, be made by the Contracting Officer. Slight delays in the use of such plant, or parts thereof, caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the use of such plant, or parts thereof, caused by other than necessary minor or field repairs. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final unless the

Contracting Officer shall, within 10 days after the machinery has been set up and working, modify or change such valuation. When and if the total rental paid to the Contractor for any such part shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, no further rental therefor shall be paid to the Contractor, and title thereto shall vest in the Government. At the completion of the work or upon termination of the contract as provided in article VI, the Government may at its option purchase any part of such construction plant by paying to the Contractor the difference between the valuation of such part or parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rentals theretofore paid for such part or parts.

General

3. The Government reserves the right to furnish any materials, construction equipment, machinery, or tools necessary for the completion of the work.

4. The Government reserves the right to pay directly to common carriers any or all freight charges on construction plant, materials, and supplies.

5. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. Rates of rental as substitutes for scheduled rental rates may be agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with similar rates of rental charged in the particular territory in which the work covered by this contract is to be performed. Such substitute rates shall be subject to the approval of the Chief of Branch, but shall be followed until so approved, at which time any necessary adjustments in prior payments will be made.

7. No salaries of the Contractor's executive officers, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in section 1 of this article, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

8. The Contractor shall, to the extent of his ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications, and when unable to take advantage of such benefits he shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials [fol. 22] of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

9. All revenue from the operations of the hospital or other facilities, except commissaries, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

Article III. Payments

Reimbursement for Cost

1. The Government will currently reimburse the Contractor for expenditures made in accordance with article II upon certification to and verification by the Contracting Officer of the original signed pay roll for labor, the original paid invoices for materials, or other original papers. Generally, reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

Rental for Contractor's Equipment

2. Rental as provided in article II for such construction plant or parts thereof as the Contractor may own and furnish shall be paid monthly upon presentation of proper vouchers.

Payment of the Fixed-Fee

3. The fixed-fee prescribed in article I shall be compensation in full for the services of the Contractor, including profit and all general overhead expenses. Ninety per cent (90%) of said fixed-fee shall be paid as it accrues, in monthly installments based upon the percentage of the completion

of the work as determined from estimates made and approved by the Contracting Officer. Upon completion of the work and its final acceptance, any unpaid balance of the fee shall be paid to the Contractor. If the contract is terminated for the convenience of the Government, before completion, the Contractor will be paid that proportion of the prescribed fee which the work actually completed bears to the entire project, less fee payments previously made. If the contract is terminated due to the fault of the Contractor, no additional payments on account of the fee will be made.

[fol. 23]

Payments by Contractor

4. If bills for purchase of material, machinery or equipment or pay rolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor hereunder are not promptly paid by the Contractor or subcontractor as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor any amount equivalent to the amount of any such bill or pay roll. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly, in such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

Final Payment

5. Upon completion of the work and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Article II hereof, and of the fee, less any sum that may be necessary to settle any unsettled claims for labor or material, or any claim the Government may have against the Contractor. The Contracting Officer shall accept the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Article IV. Records and accounts—Inspection and audit

1. The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual cost to him of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the [fol. 24] Contractor shall preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article V. Special requirements

1. The contractor hereby agrees that he will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such amounts and for such periods of time as the Contracting Officer may approve or require.

(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein

a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of \$500 shall be made or placed without the prior approval of the Contracting Officer.

(d) Enter into no subcontract for any portion of the work, except in the form prescribed by the Secretary of War, nor without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly in or in part at the site of the work, or some part of the work described in Article I hereof.

(e) At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give.

(f) The Contracting Officer may require the Contractor to dismiss from the work such employee as the Contracting [fol. 25] Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(g) At all times use his best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article VI. Termination of Contract by Government

1. Should the Contractor at any time refuse, neglect, or fail to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract

and shall proceed to cancel promptly all existing orders and terminate work under all subcontracts insofar as such orders and/or work are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of all materials, tools, equipment, and appliances and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

[fol. 26] (b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article II and not previously reimbursed.

(c) If this contract is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting services in connection with the settlement of this contract as the Contracting Officer may approve.

(d) The Government shall pay to the Contractor any unpaid balance for the rental of the Contractor's equipment in accordance with Article II to the date of termination, and if any of the Contractor's equipment is retained by the Government under the provisions of this article, additional compensation therefor shall be paid in accordance with Article II, either by purchase or rental at the election of the Contracting Officer.

(e) The obligation of the Government to make any of the payments required by this article, or by paragraph 3, Article III of this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor.

Article VII. Preference for Domestic Articles

1. In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be expected by the head of the department under the proviso of title III, section 3, of the Act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, section 10b).

2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos	Jute	Platinum
Balsa wood	Kaurigum	Rubber
China wood oil	Lac	Silk
(Tung oil)	Nickel	Sisal
Chromium	Nickle alloy	Teak wood
Cork	(Monel metal)	Tin

Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten, or mica of foreign origin may be used (subject to the requirements of

applicable specifications) in the work herein specified, if such manufactured articles, materials, or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States.

Article VIII. Convict labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article IX. Rates of wages—Nonrebate

1. In accordance with the act of August 30, 1935 (49 Stat. 1011; 40 U. S. C. 276a and 276a-1), the following provisions shall apply:

(a) The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those established by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor [fol. 28] or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to pro-

ceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

2. Should the Contractor or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included as established for the work by the Secretary of Labor, such increased wage shall be at the expense of the Contractor and shall not be reimbursed by the United States. When, in connection with the audit and ~~and~~ by the Contracting Officer or his authorized representative, of the Contractor's pay rolls, prior to reimbursement as contemplated in paragraph 1, of article II hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates, established for such laborers and/or mechanics, the reimbursement made to the Contractor on account of such pay rolls will not include such excess payments. The provisions of this section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor.

3. The Contractor shall furnish to the Government representative in charge at the site of the work covered by this contract or if no Government representative is in charge at the site, shall mail to the Federal agency having control of the project, within 7 days after the payment of each and every weekly pay roll, an affidavit, in the form prescribed by regulations issued jointly by the Secretary of the Treasury and the Secretary of the Interior under date of January 8, 1935, or any modification thereof pursuant to the act of June 13, 1934 (48 Stat. 948; 40 U. S. C. 276b and 276c), sworn to by the officer or employee of the Contractor supervising such payment to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates, or deductions from any wages due such employee or employees not required by law have been made either directly or indirectly, and that to the best of the [fol. 29] knowledge and belief of the affiant no agreement

or understanding exists with any person employed on the project pursuant to which any person, directly or indirectly, by force, intimidation, threat, or otherwise, induces or receives any deductions or rebates in any manner whatever from any sum paid or to be paid any person for labor performed in carrying out this contract. At the time upon which the first affidavit with respect to wages — said employees is filed the Contractor shall also furnish an affidavit executed by its president or a vice president, setting forth the name of the officer or employee who supervises the payment of employees and stating that such officer or employee is in a position to have full knowledge of the facts set forth in the affidavit respecting the payment of wages of employees. A similar affidavit shall be filed immediately in the event that a change is made in the officer or employee who supervises the payment of employees. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

Article X. Workmen's compensation laws

The act of June 25, 1936 (49 Stat. 1938, 1939; 40 U. S. C. 290), provides that the several States have authority to make their workmen's compensation laws applicable to contracts for the construction, alteration, or repair of a public building or public work of the United States, and the several States are vested with the power and authority to enforce such State laws on lands of the United States.

Article XI. Accident prevention

The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, local, State, and municipal safety laws and building construction codes.

Article XII. Officials not to benefit

No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article XIII. Approval required

This contract shall be subject to the written approval of The Secretary of War and shall not be binding until so approved.

Article XIV. Covenant against contingent fees

The Contractor warrants that he has not employed any [fol. 30] person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article XV. Disputes

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch, concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is \$15,000 or less. When the amount involved is more than \$15,000, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article XVI. Contractor's organization and methods

Upon the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part-time service in connection with the work under contract, together with a written statement of the duties of each person and the administrative procedure to

be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part-time service outside of the central-office organization, together with a written statement of the duties and rates of pay of each person and the procedure proposed to be allowed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, [fol. 31] housing, sanitation, subsistence, recreation, and similar essential activities and methods.

Article XVII. Definitions

1. The term "Chief of Branch" refers to the head of a branch or bureau of the War Department, viz., the Quartermaster General, the Chief of Engineers, etc.

2. The term "his duly authorized representative" shall mean any person authorized by the Secretary of War or a chief of branch, as the case may be, to act for him, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

Article XVIII. Alterations

The following changes were made in this contract before it was signed by the parties hereto;

Changes are set forth in Appendix "B", attached hereto and made a part hereof.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by (S.) C. D. Hartman, Brig. Gen., QMC., Contracting Officer; Dunn Construction Company, Inc. (Contractor), by (S.) W. R. J. Dunn, (Seal), President, and John S.

Hodgson and Company (Contractor), by (S.) John S. Hodgson, Partner, Both of Birmingham, Alabama.

Approved September 10, 1940. (S.) E. B. Gregory, Major General, The Quartermaster General.

Two Witnesses: (S.) Mary L. Biinte, 1325 Emerson St. N. E., Washington, D. C. (S.) O. P. Easterwood, Jr., 4200 Fourth St., North Arlington, Va.

Approved September 12, 1940, by direction of the Secretary of War. (S.) Robert P. Patterson, The Assistant Secretary of War.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, W. R. J. Dunn, who signed this contract for the Dunn Construction Company, Inc., had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(S.) C. D. Hartman, Brig. Gen., QMC., (Contracting Officer).

[fol. 32] Directions for Preparation of Contract.

1. This form shall be used when authorized by the Secretary of War for formal contracts for the construction, alteration, or repair of buildings or works accomplished under the provisions of the law specifically authorizing the use of a cost-plus-a-fixed-fee contract.

2. There shall be no deviation from this approved contract form, except as provided for in these directions without approval of the Secretary of War or his duly authorized representative. Where interlineations, deletions, additions, or alterations are authorized, specific notations of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations".

3. All blank spaces on the title page must be filled in including a citation of the act or acts authorizing the con-

tract. The Contracting Officer or his duly authorized representative will sign the certificate of availability of funds appearing on the title page.

4. The blank space in the preamble is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

5. The blank spaces in articles I and XIII must be filled in with the data indicated therein. The contract must be dated, and the performance and payment bonds, if required, must bear the same date.

6. Each appendix will contain a sufficiently descriptive statement to identify it with the contract viz:

Appendix "A"

to Contract No. ——— dated — —, — — between The United States of America and ——— for the construction of ———.

7. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the Contractor's number will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

8. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond if required, as well as other administrative details, shall be as directed, by the Chief of Branch to which the contract pertains.

9. An Officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the Contractor.

10. If the Contractor is a corporation, one of the certificates following the signature of the parties must be executed.

If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the Contracting Officer. In lieu of either of the aforementioned certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the Contractor must be inserted and the contractor signed with his usual signature. Typewrite or print name under all signatures to contract or bonds.

12. Any provisions respecting labor or materials required by law to be included in this contract and any additional contract provisions deemed necessary for the particular work shall be made the subject of one or more additional articles or included in the specifications, appendix "A".

[fol. 34] STATE OF ALABAMA,
Jefferson County:

I, the undersigned, I. S. Hoffpauir, as secretary of the Dunn Construction Company, Inc., hereby certify that the following is an exact extract from the by-laws of said corporation:

"The President shall be the chief executive officer of the company, he shall preside at all meetings of the Directors and of the Stockholders; he shall have general and active management of the business of the company; shall see that all orders and resolutions of the Board of Directors are carried into effect; shall make and execute all contracts for or pertaining to construction work of any and every kind, without formal approval of the Directors' express authority to so make and execute such contracts being hereby conferred upon him, together with right to affix company seal thereto; shall execute all contracts and agreements otherwise authorized by the Board."

I further certify that W. R. J. Dunn is at this time and has been for many years President of the Dunn Construction Company, Inc.

(S.) I. S. Hoffpauir, Secretary. (Seal.)

Subscribed and sworn to before me this the 9 day of September, 1940. (S.) Jessica Ingram, Notary Public. (Seal.) Term expires Dec. 19, 1942.

Appendix "B"

To Contract No. W. 6119 qm-161, dated September 9, 1940, between The United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company

1. The following changes were made in the aforementioned contract before it was signed:

a. In Article II, Section 1 (c) lines 1, 2, and 3 the words "mentioned in the schedule of rental rates in Appendix "B", hereto attached and made a part hereof, except as hereinafter set forth.", were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

b. In Article II, Section 1 (d), the following phrase was inserted in line 1 between the words "unloading" and "of": "at the site of the work". There was also inserted in line [fol. 35] 3 of said Article and Section between the words "work" and "except" the phrase: "and return transportation f. o. b. cars to the point of original shipment or equivalent mileage".

c. In Article II, Section 2, lines 2 and 3, the words "mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth" were deleted therefrom and in lieu thereof the following words were inserted: "approved by the Contracting Officer."

d. In Article IX, Section 2, the following sentence was added at the end thereof: "The provisions of this section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer who executed this contract or his successor."

War Department, O. Q. M. C.

Change Order A

Authorization and Approval of Wage Rates in Excess of
Those Predetermined by the Secretary of Labor

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartman, Brigadier General, Quartermaster Corps, as Contracting Officer, and Dunn Construction Company, Inc., and John S. Hodgson & Co., Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto, at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and Sub-Contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below,

Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification.	Rate.
Asbestos Workers	\$1.25 per hr.
" " Helpers .....	.62½ " "
Bricklayers	1.25 " "
" Helpers .....	.50 " "
[fol. 36] Plumbers	1.25 per hr.
" apprentices .....	.62½ " "
Rodmen	1.25 " "
Roofers, Composition	1.00 " "
" " Kettlemen .....	.50 " "
Roofers, Composition Apprentices .....	.50 " "
" Slate & Tile	1.25 " "
Sheet metal workers, Helpers .....	.50 " "
Structural Iron Works	1.50 " "
Common Laborers .....	.40 " "
Builders Laborers .....	.50 " "
Marble Masons, Slate & Structural Glass Workers	1.25 " "

Classification.	Rate.		
Mosaic Terazo Workers	1.25	"	"
" " " .....	.60	"	"
Sprinkler Fitters	1.25	"	"
" " Helpers .....	.50	"	"
Steam Fitters	1.25	"	"
" " helpers .....	.62 $\frac{1}{2}$	"	"
Stone Cutters	1.25	"	"
Stone Masons	1.25	"	"
" " helpers .....	.50	"	"
Tile Layers	1.25	per hr.	
" " helpers .....	.50	"	"
Waterproofers	1.25	"	"
Watchmen .....	.40	"	"
Waterboys .....	.40	"	"
Painters & Decorators	1.00	"	"
Plasterers	1.25	"	"
" helpers & laborers .....	.50	"	"
Carpenters	1.00	"	"
Cement Finishers	1.25	"	"
Electricians	1.25	"	"
Electrician, Apprentices .....	.62 $\frac{1}{2}$	"	"
Elevator Constructors	1.50	"	"
Glasiers	1.00	"	"
Hodcarriers .....	.50	"	"
Sheet Metal Workers	1.25	"	"
Ornamental Iron Workers	1.50	"	"
[fol. 37] Rodlayers, Reinforced	1.25	per hr.	
Structural Iron Workers, Apprentices .....	.93	"	"
Concrete Laborers .....	.40	"	"
Lathers, Metal	1.00	"	"
" Wood	1.00	"	"
Marble Masons, Slate & Structural Glass Workers, helpers .....	.62 $\frac{1}{2}$	"	"
Operators of Powered Equipment:	1.37 $\frac{1}{2}$	"	"
Operators of two-drum equipment			
Operators of Heavy Duty Machines of over one yard capacity	1.50	"	"
All other operators of powered equipment	1.25	"	"
Oilers and Firemen .....	.75	"	"
Mechanics for Comple Equipment	1.50	"	"

Date September 30, 1940. By direction of the Contracting
Officer.

(S.) E. E. Kirkpatrick, Capt. Q. M. C.

Authenticated Copies:	Executed numbers:
1 to C. Q. M.	1 To C. Q. M. for contractor
1 To Disbursing Officer	2 To Legal Section
1 To Contracting Officer	(See AR 5—200, par. 15 & 19)
1 To Legal Section	
1 To Fixed Fee Section	
1 to Adm. Sec. O. Q. M. G. (Lab. Rel.)	

War Department, O. Q. M. G.

Change Order B.

**Authorization and Approval of Wage Rates in Excess of
Those Predetermined by the Secretary of Labor**

Reference is made to Contract No. W 6119 qm-161 Dated 9/9/40 between the United States of America, signed for and in behalf thereof by C. D. Hartman, Brigadier General, Quartermaster Corps, as Contracting Officer, and Dunn Construction Co., Inc., and John S. Hodgson & Company, Birmingham, Alabama, for the construction of a complete tent camp, including necessary buildings, structures, utilities and appurtenances thereto at Fort McClellan, Alabama. It has been determined that in order to complete promptly and efficiently the work provided for thereunder, it is necessary that the Contractor and Sub-Contractor pay to laborers and mechanics a higher rate of wages than the predetermined minimum rates prescribed by the Secretary of Labor for classifications enumerated below.

[fol. 38] Therefore, in accordance with Section 2, Article IX, as amended by Appendix "B", of the Contract, the Contracting Officer hereby approves as a reimbursable cost to the Contractor and Sub-Contractors, payment of the following rates of wages:

Classification.	Rate.
Asbestos workers	\$1.25 per hr.
" " helpers .....	.62½ " "
Blacksmiths	1.00 " "
Asphalt rakers, tampers and smoothers...	.60 " "
Bricklayers	1.25 " "
" " 2nd year .....	.70 " "
Carpenters, journeymen	1.00 " "
" apprentices: 1st year .....	.60 " "

Classification.	Rate.	
Carpenters, apprentices: 3rd year	.80	per hr.
" " 4th year	.90	" "
Cement finishers	1.25	" "
Electricians	1.25	" "
" helpers	.62½	" "
Firemen and oilers	.75	" "
Glaziers	1.00	" "
Jackhammermen	.50	" "
Laborers, unskilled	.40	" "
Machinists	1.25	" "
Mechanics, complex equipment	1.25	" "
" auto	.75	" "
Mason tenders	.50	" "
Mortar mixers	.50	" "
Operators of power equipment:		
Air compressors: portable	1.00	" "
stationary	1.25	" "
Asphalt plant	1.25	" "
Blade graders	.75	" "
Cranes, derricks, draglines, over 1 cu. yd.	1.50	" "
" " " 1 cu. yd. or less	1.25	" "
Distributors (bituminous surfaces)	1.00	" "
Finishing machines (cement concrete pavement)	1.00	" "
Hoists, 1 drum	1.00	" "
" 2 or more drums	1.25	" "
" on steel construction	1.37½	" "
[fol. 39] Mixers, under 1 cu. yd.	1.00	" "
" 1 cu. yd. and over	1.25	" "
Pumps	.75	" "
Rollers	1.00	" "
Scrapers	1.00	" "
Shovels: 1 cu. yd. or less	1.25	" "
" over 1 cu. yd.	1.50	" "
Tractors	.85	" "
Mortar mixing machines	.50	" "
Trenching machines	1.25	" "
Painters	1.00	" "
Pipe layers	1.60	" "
Plasterers	1.25	" "
" tenders	.50	" "
Plumbers	1.25	" "
" helpers	.62½	" "

Classification.	Rate.
Reinforcing rodsetters	1.25 per hr.
Roofers, composition	1.00 " "
Sheet metal workers	1.25 " "
Steam fitters	1.25 " "
" " helpers .....	.62 $\frac{1}{2}$ " "
Structural-iron workers	1.50 " "
Trackmen .....	.50 " "
Truck drivers .....	.50 " "
Well drillers	1.00 " "
" " helpers .....	.75 " "
Boilermakers	1.00 " "

Date November 7, 1940.

By direction of the Contracting Officer.

(S.) E. E. Kirkpatrick, Capt. Q. M. C.

Authenticated copies:

1 to C. Q. M.

1 To Disbursing Officer.

1 To Contracting Officer.

1 To Legal Section.

1 To Fixed Fee Section.

1 To Adm. Sec. O. Q. M. C. (Lab. Rel.).

Executed numbers:

1 To C. Q. M. for contractor.

2 To Legal Section.

(See Ar. 5-200, par. 15 & 19.)

[File endorsement omitted.]

[fol. 40] IN CIRCUIT COURT OF MONTGOMERY COUNTY

SUMMONS AND RETURN

THE STATE OF ALABAMA,

Montgomery County:

To any Sheriff of the State—Greetings:

You are hereby commanded to Summon John C. Curry, Individually, and as Commissioner of Revenue of the State of Alabama, to appear and plead to, answer or demur, within thirty days from the service hereof, to the bill of

Complaint filed in the Circuit Court of Montgomery County, in Equity, against him by United States of America and Dunn Construction Company, Inc., et als.

(Copy of Bill of Complaint attached.)

Witness my hand this 16th day of May, 1941.

Geo. H. Jones, Jr., Register.

Executed by handing the defendant John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama a copy of the within Summons together with copy of Bill of Complaint on the 20 day of May, 1941.

G. A. Mosley, Sheriff, by G. & H., D. S.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AMENDED PETITION FOR DECLARATORY JUDGMENT—Filed May 29, 1941

To the Honorable Judges of the Circuit Court of Montgomery County, Sitting in Equity:

Comes now the United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company, and file this their amended petition for a declaratory judgment and respectfully show unto the Court as follows:

1. The plaintiff, the United States of America, is a cor-
[fol. 41] poration sovereign and body politic.

2. The plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, are a partnership consisting of Dunn Construction Company, Inc., a corporation organized and existing under the laws of the State of Delaware, and John S. Hodgson and Company, an Alabama partnership consisting of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham in the State of Alabama.

3. The plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership consisting

of Dunn Construction Company, Inc., and John S. Hodgson and Company, with their principal place of business at Anliston, in the State of Alabama, are and have been engaged for and on behalf of the United States as an agency and instrumentality of the United States in the construction of a complete tent camp, necessary buildings, temporary structures, utilities and appurtenances thereto for the United States of America at Camp McClellan, in the State of Alabama, under the provisions and requirements of the contract entered into by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, with the United States of America, a true and certified copy of which is attached hereto marked Exhibit "C" and prayed to be read as a part hereof. Said contract provides that the cost of performing and executing the same, including the cost of all materials purchased therefor and the amount of any applicable and valid taxes, shall be assumed and borne by the plaintiff, the United States of America, and reimbursement therefor made by the United States of America to the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid.

4. The defendant, the Honorable John C. Curry, is Commissioner of Revenue of the State of Alabama.

5. On May 8, 1941, the State Department of Revenue of the State of Alabama, as will appear from a copy of a minute entry of the State Department of Revenue, which is attached hereto marked Exhibit "A" and prayed to be read as a part hereof, determined pursuant to Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, and upon information in the possession of the State Department of Revenue that for the quarterly period beginning January 1, 1941, and ending March 31, 1941, the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, had made purchases of tangible personal property during the [fol. 42] said quarterly period which it is alleged is subject to the tax imposed by Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, and computed and determined the amount of tax due by the plaintiffs, Dunn Construction Company, Inc. and John S. Hodgson

and Company, a partnership as aforesaid, for the said period as follows:

Item 1. Total sales price of tangible personal property purchased by said Taxpayers outside of Alabama or in interstate commerce, for storage, use or consumption by said taxpayers in this State, upon which the seller has not collected from said Taxpayers the use tax (not including purchases of automotive vehicles)	\$2,313.17
Item 4. Total amount remaining as measure of tax	\$2,313.17
Item 5. Amount of tax (2% of Item 4)	\$ 46.26
Item 6. Plus 10% Penalty upon \$—	\$ 4.63
Item 7. Plus interest at the rate of $\frac{1}{2}$ of 1% per month, or fraction thereof, from the 20 day of April, 1941, to the 8 day of May, 1941, upon the tax as herein computed and determined	\$.23
Item 8. Total tax, penalty, and interest thereon due to the 8 day of May, 1941	\$ 51.12

6. Based upon such computation and determination the State Department of Revenue ordered, as will appear from the minute entry attached hereto as Exhibit "A", that the amount of tax determined be assessed against the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as and for the amount of tax due by them under the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, together with \$4.63 penalty thereon and interest upon the amount of said tax at the rate of $\frac{1}{2}$ of 1% per month or fraction thereof from the 20th day of April, 1941, and that written notice of the assessment be given to the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as required by the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96.

7. On May 8, 1941, the State Department of Revenue, by John C. Curry, Commissioner of Revenue, delivered to the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, a copy of the minute entry and assessment mentioned and described and fully set out in the minute entry, a copy of which is attached hereto as Exhibit "A", at which time the

plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, acknowledged receipt of the copy of the assessment above [fol. 43] mentioned and described and waived any further or other notice thereof.

8. On May 8, 1941, upon the demand of the State Department of Revenue, and of John C. Curry, Commissioner of Revenue, for the payment of tax so determined to be due and assessed against the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, in the sum of \$46.26, together with \$4.63 penalty and 23¢ interest from the 20th day of April, 1941, as assessed by the State Department of Revenue in the minute entry of the State Department of Revenue, a copy of which is attached hereto as Exhibit "A", the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, paid to the State Department of Revenue and John C. Curry, Commissioner of Revenue, the sum of \$51.12, being the sum of \$46.26, as fixed by the assessment of May 8, 1941, with a penalty of \$4.63 and interest thereon from April 20, 1941, in the amount of 23¢. Such payment was made by plaintiffs Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, and accepted by the State Department of Revenue and John C. Curry, Commissioner of Revenue, under protest duly verified. A copy of such protest and acceptance thereof by the State Department of Revenue is attached hereto and marked Exhibit "B" and made a part hereof as fully as if set out herein.

9. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales price of tangible personal property purchased outside the State of Alabama consisting of roofing materials purchased by the plaintiff, the United States, or by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States and in connection with their performance of their contract with the United States, a copy of which is attached hereto marked Exhibit "C" and stored, used or consumed by the United States or by these plaintiffs, Dunn Construction Company, Inc., and John S.

Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States, in and about the construction by them for and on behalf of the United States of certain buildings, warehouses and other camp and military facilities under the contract of the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, with the [fol. 44] United States at Camp McClellan near Anniston, Alabama. Plaintiffs allege that the transactions and activities of the agents and instrumentalities of the United States entered into for and on behalf of the United States are immune from taxation by the State of Alabama under the Constitution of the United States of America fully as much as are the transactions and activities of the United States itself, and further specifically allege that property purchased by the United States, its agencies and instrumentalities, and the storage use or other consumption of property by the United States, its agencies and instrumentalities, are immune under the Constitution of the United States of America from the tax imposed by Act No. 67, General Acts of Alabama, Regular Session, 1939, p. 96.

10. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales price of tangible personal property purchased by the plaintiff, the United States, or by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States, without the State of Alabama, but for and on behalf of the United States and delivered to the United States at Camp McClellan, Anniston, Alabama, and stored, used or otherwise consumed by or on behalf of the United States as described in paragraph 9; and the plaintiffs allege tangible personal property so purchased, stored, used or otherwise consumed by the United States or by its agents or instrumentalities is exempt from the tax imposed by Act No. 67 of the General Acts of Alabama, Regular Session, 1939, under Subsection (b) of Section 3 of that Act.

11. The tax so assessed by the State Department of Revenue and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, was assessed upon the sales prices of tangible

personal property purchased outside the State of Alabama by the plaintiff, the United States or by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States but for and on behalf of the United States and delivered to the United States or its agents or instrumentalities at Camp McClellan, Anniston, Alabama, which is within an area within the exclusive jurisdiction of the United States and the plaintiffs allege that such purchases and the storage, use or other consumption of such property on said Federal reservation are immune from taxation by the State of Alabama under the Constitution [fol. 45] of the United States of America, and further allege that the State Department of Revenue in applying the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, to the purchase, storage, use or other consumption of the property so made by the United States or on its behalf by its agents and instrumentalities have applied the provisions of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, in a manner which renders the said Act invalid and void under the Constitution of the United States of America.

12. Plaintiffs allege that the purchase, storage, use or other consumption of the roofing material, above described, was by the plaintiffs, the United States of America, or by the plaintiffs, the Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, as an agent and instrumentality of the United States for and on behalf of the United States and was in fact the purchase, storage, use or other consumption by the United States, the taxation of which by the State of Alabama is taxation of the United States by the State of Alabama; that such taxation is prohibited by and violative of the Constitution of the United States of America.

13. Plaintiffs allege that the enactment of Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96, insofar as it subjects to taxation the purchase, storage, use or other consumption of property by the United States or by the agents and instrumentalities of the United States for and on behalf of the United States is invalid and void because violative of the Constitution of the United States of America.

14. Plaintiffs allege that a controversy exists between the defendant and the plaintiffs as to whether the plaintiffs are exempt from taxation under Act No. 67 of the General Acts of Alabama, Regular Session 1939, p. 96, and immune from taxation by the State of Alabama under the Constitution of the United States of America and that such controversy exists not only with respect to tangible personal property which furnishes the basis for the assessment made by the State Department of Revenue for the period January 1, 1941 to March 31, 1941, but with respect to similar tangible personal property and other tax periods prescribed by Act No. 67 of the General Acts of Alabama, Regular Session, 1939, p. 96.

Wherefore, Premises Considered, the plaintiffs pray that this Court will take jurisdiction of this action, that the [fol. 46] Honorable John C. Curry, Individually and as Commissioner of Revenue, be made a party defendant to this bill and that process issue to him hereunder in accordance with the rules and practice of this Court. And plaintiffs further pray that this Honorable Court will, upon hearing, render a declaratory judgment and decree determining that the plaintiffs, Dunn Construction Company Inc., and John S. Hodgson and Company, a partnership as aforesaid, are not liable for the taxes assessed by the defendant and paid by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, on May 8, 1941, and that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership as aforesaid, are entitled to a refund of the tax paid by them, as aforesaid, together with the penalty and interest thereon with interest, and plaintiffs pray for such other and further relief as may be appropriate and which to this Honorable Court may seem meet.

Samuel G. Clark, Jr., Assistant Attorney General,
Thomas D. Samford, United States Attorney, Attorneys for Plaintiffs.

[File endorsement omitted.]

PROCEEDINGS BEFORE STATE DEPARTMENT OF REVENUE

Secretary's Certificate to proceedings before State Department of Revenue omitted in printing.

[fol. 47] Use tax assessment omitted. Printed side page 8, ante.

[fols. 48-50] Protest of payment of use tax omitted. Printed side page 9, ante.

[fol. 51] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

DEMURRER AND ANSWER TO PETITION AS AMENDED—Filed
May 29, 1941

Comes John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, défendant in the above entitled cause, and for answer to the Petition for Declaratory Judgment, as amended, filed in this cause makes the following defenses:

First Defense

Demurrer

Comes John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, defendant in the above entitled cause, and demurs to the Petition for Declaratory Judgment, as amended, filed in this cause, and for grounds of such demurrer thereto assigns, separately and severally, the following:

1. There is no equity in the petition.
2. Said petition fails to set out facts sufficient to entitle plaintiffs to the relief prayed for therein.
3. Said petition fails to allege sufficient facts to show [fol. 52] that the determination or assessment of said tax was illegal.
4. Said petition fails to allege sufficient facts to show that said tax was illegally levied or assessed against or collected from the contractors therein mentioned, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company.

5. Said petition fails to allege sufficient facts to show that the tangible personal property purchased at retail by said contractors for storage, use or consumption by them within the State of Alabama, under and pursuant to the contract with the United States mentioned in said petition, was exempt from the provisions of the said Alabama Use Tax Act, or from the tax assessed and collected with respect thereto under said Act.

6. Said petition fails to aver sufficient facts to show that said contractors were immune from the tax alleged to have been levied and assessed against and paid by such contractors.

7. The facts set forth in said petition are insufficient to show that said contractors were such an agency or instrumentality of the United States as would entitle them to assert or claim any immunity from the tax alleged to have been determined or assessed against and paid by such contractors.

8. For that the facts alleged in said petition show that said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, were legally liable for the determining or assessment against and payment by them of said tax, together with penalty and interest thereon, mentioned in said petition.

9. For that the facts alleged in said petition show that the United States consents to the imposition of the tax therein alleged to have been determined or assessed against and paid by said contractors.

10. For that the facts alleged in said petition show that the United States, in and by the terms of said contract therein mentioned, waived any immunity from said tax mentioned in said petition with respect to the purchase, or storage, use, or consumption by said contractors of the tangible personal property, for the storage, use or consumption of which property said tax is alleged to have been determined or assessed against and paid by said contractors.

11. For that the facts alleged in said petition show that the United States, in and by said contract, consented or agreed to permit said tangible personal property or building materials therein mentioned to be purchased by said

contractors for storage, use or consumption by them, sub-[fol. 53] ject to the tax imposed upon or required to be paid by said contractors under the provisions of said Alabama Use Tax Act.

12. For that there is a misjoinder of parties plaintiff in this: The United States of America is not shown to be either a necessary or proper party plaintiff in said action.

13. For that all the plaintiffs are not shown to have a common interest in the subject matter of said action, or in the relief prayed for therein.

14. For that said petition is repugnant in its averments and in the relief prayed for in this: it avers that said contractors were immune from the payment of said tax, yet shows that the payment thereof was expressly consented and agreed to by said contractors and the United States of America.

15. For that the averments in said petition, to the effect that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, are agents or instrumentalities of the United States in the performance of said contract, are mere conclusions of the pleader, unsupported by the allegations of fact contained in said petition.

16. For that it appears from the facts alleged in said petition that the United States expressly consented to the payment of said taxes by the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company.

17. For that it appears that the United States expressly consented to the levy, assessment and payment of the taxes therein mentioned.

18. For that the averments to the effect that the transactions therein mentioned were immune from said tax, are alleged as mere conclusions of the pleader, unsupported by the facts therein alleged.

19. For that the facts therein alleged fail to show wherein said taxes were not applicable to the storage, use or consumption by said contractors of the tangible personal property therein mentioned.

20. For that said petition fails to show wherein said taxes were invalid or illegally assessed against the contractors therein mentioned.

21. For that the facts alleged in said petition show that the contractors therein mentioned were legally liable for said taxes, and the penalty and interest thereon.

22. For that there is a misjoinder of parties plaintiff in [fol. 54] this; said petition seeks to determine a controversial issue between the plaintiff, United States of America, and the other plaintiffs therein named, in which the defendant has no interest.

23. For that the averment in said petition to the effect that said taxes were invalid is a mere conclusion of the pleader, unsupported by the facts therein alleged.

24. For aught that appears therein, the said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, purchased said tangible personal property for storage, use or consumption by them within the State of Alabama and so stored, used or consumed the same within the tax period mentioned in said assessment.

25. For that the facts alleged in said petition show that said tax was legally assessed against said contractors and paid by them under and pursuant to the provisions of said contract with the United States of America.

26. For that the averments therein to the effect that said tangible personal property was the property of the United States at the time of the storage, use or consumption thereof by the contractors are mere conclusions of the pleader, unsupported by the facts therein alleged.

And said defendant separately demurs to that phase or aspect of said petition which seeks a declaratory judgment determining that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company are not liable for the taxes assessed by defendant and paid by said named plaintiffs on May 8, 1941, and for grounds of said demurrer assigns, separately and severally, the following:

1. Defendant assigns, separately and severally, each of the grounds of demurrer hereinabove assigned to said petition as a whole.

And defendant separately demurs to that phase or aspect of said petition which seeks a refund of or a declaratory judgment with respect to the refund of the taxes therein

mentioned, together with penalty and interest thereon, and for grounds of said demurrer assigns, separately and severally, the following:

1. Defendant assigns, separately and severally, each of the grounds of demurrer hereinabove assigned to said petition as a whole.

Second Defense

As and for a second defense to said petition, and without waiving the demurrers separately and severally interposed by defendant and incorporated hereinabove, but insisting thereon, the defendant, John C. Curry, individually and as [fol. 55] Commissioner of Revenue of the State of Alabama, in answer to said petition says:

1. He admits the allegations contained in paragraph numbered 1.

2. He admits the allegations contained in paragraph numbered 2.

3. In answer to paragraph numbered 3, defendant alleges that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, acting as a partnership or as members of a joint-venture, with their principal place of business at Anniston (or Birmingham) in the State of Alabama, during the quarterly period beginning January 1, 1941, and ending March 31, 1941, as contractors and under and by virtue of the contract mentioned in said petition, a copy of which is shown by Exhibit C thereto, engaged in the construction for the United States of the buildings and improvements mentioned in said contract; that said buildings and improvements therein mentioned were so constructed by said contractors at Fort McClellan in Calhoun County in the State of Alabama, and that said contractors, under and pursuant to said contract, during said period, purchased at retail certain tangible personal property which was purchased from a point or points outside of the State of Alabama, and which was transported from such point or points and delivered to said contractors within Calhoun County, Alabama, for storage, use or consumption by said contractors in the performance of said contract, and which was, during said period, stored, used or consumed by said contractors within the State of Alabama in the construction of said buildings and improvements by

said contractors under said contract; that said tangible personal property consisted of building materials so purchased at retail and stored, used or consumed by said contractors within the State of Alabama, within said period, in the performance of the obligations assumed by them under said contract; that no sales tax was paid or payable to the State of Alabama with respect to the sale of such tangible personal property to said contractors, and that such storage, use or consumption of such tangible personal property by said contractors was a privilege taxable by the State of Alabama; and that the tax imposed thereon by the State of Alabama against said contractors under the terms and provisions of the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, Regular Session, 1939, page 96, approved February 28, 1939, was validly imposed, computed, determined and assessed against said [fol. 56] contractors; and that said tax, together with the interest and penalties therein mentioned, were validly assessed and paid by said contractors.

For further answer to said paragraph numbered 3, defendant expressly denies that said contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, engaged in the performance of such construction, or purchased, stored, used or consumed said tangible personal property as an agency or instrumentality of the United States, but that such purchases, construction, storage, use and consumption by them was done and exercised by them in their capacity as contractors or independent contractors; that such contractors were legally liable for said taxes; and that said taxes were applicable to the performance of said contractors, or the purchase by them of said tangible personal property or material, or to the storage, use or consumption thereof by said contractors under said contract. Defendant alleges that in and by said contract, and particularly the provisions of paragraph (m) of Article II, Section 1 of said contract, the United States consented to the payment by said contractors of said taxes, and in and by said contract expressly agreed to reimburse said contractors for the payment thereof.

4. Defendant admits the allegations of paragraph numbered 4 of said petition.

5. In answer to paragraph numbered 5 of said petition, defendant admits that on May 8, 1941, the State Depart-

ment of Revenue of the State of Alabama, pursuant to the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, approved February 28, 1939, (General Acts of Alabama, Regular Session, 1939, p. 96) determined and assessed against said contractors, namely, Dunn Construction Company, Inc., and John S. Hodgson and Company, the tax, penalty and interest thereon, for the quarterly period beginning January 1, 1941, and ending March 31, 1941, as shown by Exhibit A attached to said petition; that said determination or assessment was made with respect to certain tangible personal property purchased at retail by said contractors from without the State of Alabama for storage, use or consumption by said contractors within this State, and which property was, during said period, so stored, used or consumed by said contractors within the State of Alabama in and about the performance by them of said contract with the United States, a copy of which contract is shown by Exhibit 6 to said petition; and that the storage, use or consumption of said property was not exempt from but subject to the provisions of said Act.

[fol. 57] For further answer to said paragraph, defendant denies that said tax was levied, determined, assessed or collected upon such tangible personal property or the purchase thereof, but was an excise tax imposed upon the storage, use, or consumption thereof by said contractors in this State, as provided by said Alabama Use Tax Act, which act is complementary to the Alabama Sales Tax Act of 1939, Act No. 18 of the General Acts of Alabama of 1939 approved February 8, 1939 (General Acts, Regular Session 1939, p. 16), both of which Acts defendant avers are valid enactments; and defendant denies any charge or implication in said petition to the effect that said use tax therein mentioned was a tax imposed upon said tangible personal property, or the purchase or transportation thereof in interstate commerce.

6. In answer to the allegations of paragraph numbered 6 of said petition, defendant admits that said tax and penalty and interest thereon were duly computed, determined and assessed by the State Department of Revenue against said contractors as the amount of tax, penalty, and interest thereon, due by them under the provisions of said Alabama Use Tax Act, as particularly shown by the minute entry, a copy of which is attached as Exhibit A to said peti-

tion; and that written notice thereof was duly given to said contractors, as required by the provisions of said Alabama Use Tax Act, as shown by acknowledgment or acceptance of service thereof by said contractors endorsed on said minute entry, a copy of which is shown by said Exhibit A.

7. Defendant admits the allegations of paragraph numbered 7 of said petition.

8. Defendant admits the allegations of paragraph numbered 8 of said petition.

9. In answer to the allegations contained in paragraph numbered 9 of said petition, defendant says that the amount of said tax so assessed against said contractors was assessed at the rate of two per cent of the sales price of said tangible personal property, namely, certain roofing or building material purchased by said contractors at retail during said tax period, and which was stored, used or consumed by said contractors in this State during said tax period, the storage, use or consumption of which property was not exempt from the tax imposed by said Alabama Use Tax Act.

For further answer to said paragraph, defendant denies that said tax was levied or assessed upon the purchase or [fol. 58] sale of said tangible personal property, or upon or against said property, or upon or against the transportation or importation thereof.

For further answer to said paragraph, defendant denies that said contractors, acting as a partnership in a joint-venture, under or pursuant to said contract with the United States, or individually or otherwise, were agents or instrumentalities of the United States, in connection with their performance of said contract in such manner or to such extent as to entitle said contractors, or either of the-, to assert or claim any immunity from the tax alleged to have been assessed against and paid by said contractors under the provisions of said Alabama Use Tax Act; and defendant denies that said contractors stored, used, or consumed said tangible personal property as an agent or instrumentality, or as agents or instrumentalities of the United States, but stored, used, or consumed said property as contractors under and by virtue of said contract with the United States in the performance by them of their obligations under said contract in connection with the construc-

tion of the buildings or improvements mentioned in said contract.

For further answer to said paragraph, defendant denies the storage, use, or consumption by said contractors of said tangible personal property during said taxable period within the State of Alabama, and for or with respect to which said tax was assessed and paid by them, was immune from taxation by the State of Alabama under the Constitution of the United States, or otherwise; and defendant further denies that the transactions, activities or privileges for which said tax was assessed and paid by said contractors were in anywise entitled to the immunity from taxation which would have been applicable thereto if such property had been purchased directly by the United States; and defendant denies that the storage, use or other consumption of said tangible personal property so purchased or acquired by said contractors and so stored, used or otherwise consumed by them was immune from taxation under the Constitution of the United States of America, or was immune from the tax imposed under and by virtue of said Alabama Use Tax Act.

10. In answer to the allegations of paragraph numbered 10 of said petition, defendant denies that said tax was assessed upon the sale of said tangible personal property or upon the purchase thereof, or upon said property, or that the same constituted a tax upon an interstate transaction, or constituted a tax upon or against property of the United States of America; and defendant denies that said tangible [fol. 59] personal property was purchased by the United States, but as hereinabove set forth, defendant alleges that said property was purchased by said contractors under and pursuant to said contract, and that thereafter said property was stored, used or otherwise consumed by said contractors in the performance by them of the obligations imposed upon them under the provisions of said contract with the United States; that the tax so imposed upon said contractors was applicable to them and to the performance by them of the duties and obligations imposed upon them under said contract, and to their use of said material; that said tax was a valid tax imposed by the State of Alabama upon said contractors and which, under the provisions of said Alabama Use Tax Act, was duly and legally required to be paid by said contractors; that the assessment and payment

thereof was expressly provided for in said contract, as a part of the cost of each construction, and for the amount of which the United States expressly contracted and agreed to reimburse said contractors, under and pursuant to said contract, and which contract defendant alleges was in full force and effect during said tax period, and is still in full force and effect; and which contract in effect constituted a consent granted by the United States to the State of Alabama for the imposition of such tax and a waiver of immunity, if any, against said tax. And defendant denies that the tangible personal property was, in fact, sold, transferred or delivered to the United States by said contractors or by anyone else, or that the United States or any officer or agent thereof acquired the title thereto prior to the actual storage, use or consumption of said property by said contractors in this State; and defendant alleges that such method of shipment or delivery of said property followed by the contractors and the United States, or either of them, was not such as to permit the storage, use or consumption of said property by said contractors in this State free from said tax; and the defendant alleges that if said property was shipped or delivered to any one other than said contractors, it was for their said use and benefit, or it was contrary to or in violation of the provisions of said contract, or that such method of shipment, delivery or handling of said property was pursued in an attempt to evade the lawful payment of said tax by said contractors; or, if defendant is mistaken in alleging the manner or purpose of such shipment or delivery to any one other than said contractors, defendant alleges that such shipment and delivery were for the purpose of impressing a lien upon said property in favor of the United States, as security for the performance of said contract by said contractors; and defendant alleges that such shipment or delivery of said property to the United States or to any officer or agent thereof was not unconditional, but was for the benefit of and subject to the rights of said contractors, as such, under the terms of said contract to store, use or consume said property in the performance of their said contractual obligations.

11. In answer to the allegations contained in paragraph numbered 11 of said petition, defendant denies that said tax so assessed against said contractors was assessed upon the

sales price, or upon the sale or purchase of said property by said contractors, or against any interstate transaction in connection with such purchase, sale or transportation thereof; and denies that said contractors in the performance of said contract constituted such an agency or instrumentality of the United States as to entitle said contractors to assert any immunity from said tax with respect to the storage, use or consumption by them of such tangible personal property. And defendant denies that said property was unconditionally delivered or caused to be delivered by said contractors to the United States at said Camp McClellan or Fort McClellan in Anniston, Calhoun County, Alabama, or that the title to said tangible personal property vested in the United States before such storage, use or consumption thereof by said contractors, and defendant alleges that said property was, in fact, delivered to said contractors for storage, use or consumption by them in the performance of their said contract upon or at Camp McClellan or Fort McClellan near Anniston in Calhoun County, Alabama, and was so stored, used or consumed by said contractors. Defendant admits that prior to said taxable period said Camp McClellan or Fort McClellan comprised an area over which the State of Alabama ceded to the United States exclusive jurisdiction, but the defendant alleges that subsequent to such cession and before the beginning of said taxable period, under and by virtue of an act or resolution adopted by the Congress of the United States known as the Buck Resolution (Sections 12 to 18, inclusive, Title 4, U. S. C. A., adopted October 9, 1940, effective January 1, 1941), the United States expressly released or relinquished to the State of Alabama over and upon said area jurisdiction to impose said tax, and thereby expressly consented to the application of said use tax against said contractors and against persons engaged in the performance of such contracts as the contract mentioned in said petition, and that, therefore, said use tax [fol. 61] was in all respects applicable for and during said period against said contractors, and that said contractors were not such agencies or instrumentalities of the United States as were or are entitled to assert any immunity from said tax; and that the United States, as to such contractors, by virtue of said contract, and by virtue of the Act or Acts pursuant to which said contract was executed and under and by virtue of the provisions of said Buck Resolution ex-

pressly released or surrendered to the State of Alabama jurisdiction to impose such use tax upon said contractors, and granted to the State of Alabama consent to impose such tax, and in pursuance of which said assessment was made; and defendant therefore alleges that neither said contractors nor the United States are entitled to assert or claim any immunity from or with respect to said tax mentioned in said petition. And defendant denies that the assessment or collection of said tax was or is in violation of the Constitution of the United States; or that said tax constitutes in fact any prohibited or undue burden upon either said contractors or the United States of America.

12. In answer to paragraph 12 of said petition, the defendant denies that said tangible personal property, namely, certain roofing or building material, involved in the assessment mentioned in said petition was purchased by the United States, or that the only storage, use or consumption thereof was by the United States; and defendant alleges that said property was purchased by said contractors, and pursuant to and by reason of said purchase, said material was, in fact, delivered to said contractors as such for and in the performance by them of their obligations under said contract, and was so used by them prior to the delivery thereof to the United States, or the vesting of any title thereto in the United States. If defendant is mistaken in alleging that such property was stored, used or consumed by said contractors prior to any delivery thereof to the United States, he alleges that any delivery of such property to the United States or any officer thereof prior to the storage, use or consumption thereof by said contractors was for the benefit of said contractors, and that the legal and beneficial title or the beneficial title to said property and the right of said contractors to store, use or consume the same in the performance of their obligations under said contract remained in full force and effect until said tangible personal property or material was used by said contractors in and became a part of the buildings or improvements being constructed by said contractors under the provisions of said contract; and defendant denies that the levy or assessment [fol. 62] of said use tax against said contractors under said Alabama Use Tax Act constituted, in law or in fact, a taxation of the United States, or of its property by the State of Alabama in violation of the Constitution of the United States of America.

13. In answer to the allegations of paragraph numbered 13, defendant denies that said Alabama Use Tax Act imposes, or attempts or purports to impose, any tax upon the United States with respect to any property, or the storage, use or consumption of any property purchased or acquired directly by the United States; and defendant denies that either the purchase or the storage, use or other consumption of tangible personal property by said contractors in the performance by them of their contractual obligations under said contract were or are immune from taxation by the State of Alabama, or that such contractors constituted such agents or instrumentalities of the United States as are immune from the tax imposed upon and required to be paid by them under said Alabama Use Tax Act, or that the assessment or collection of said tax was in violation of the Constitution of the United States. On the contrary, defendant alleges that the United States, in and by the terms of the Acts authorizing the execution of said contract, and the provisions of said Buck Resolution, and the provisions incorporated in said contract pursuant to law, constituted and expressed a consent on behalf of the United States to such taxation of said contractors as provided in said Alabama Use Tax Act; and defendant alleges that under and pursuant to said contract, the United States waived its right directly to purchase or acquire said property in such manner as to make such purchase or acquisition immune from taxation.

14. Defendant admits there is a controversy between the defendant and the plaintiffs as to whether said contractors, with respect to the purchase or storage, use or consumption by them of tangible personal property within this State for the purposes and in connection with the performance by said contractors of said contract with the United States, are exempt from taxation under said Alabama Use Tax Act, or are immune from taxation by the State of Alabama under the Constitution of the United States; and that such controversy exists not only with respect to the storage, use, or consumption of the tangible personal property included in said assessment made by the State Department of Revenue against said contractors for said taxable period from January 1, 1941, to March 31, 1941, but also exists with respect to the storage, use or consumption by said contractors or other and similar tangible personal property

[fol. 63] purchased or acquired by said contractors, and stored, used or otherwise consumed by them, pursuant to said contract with the United States, in the same or other tax periods prescribed by said Alabama Use Tax Act.

For further answer to said paragraph, defendant says that the questions presented for adjudication or determination by the Court in this case involve public questions of importance with respect to the revenue of the State of Alabama, and he, therefore, prays that upon the hearing of said cause, the Court enter a declaratory judgment or decree construing said Alabama Use Tax Act, as the same may apply to said contractors with respect to the storage, use or consumption in this State by them of tangible personal property purchased or acquired by them under said contract with the United States, and that this Court will adjudicate and determine whether or not said tax mentioned in said petition was legally assessed against and paid by said contractors or whether or not said contractors are entitled to a refund thereof.

And now having fully answered said petition, defendant prays that it may be hence dismissed with his reasonable costs in this behalf expended.

Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS—Filed May 29, 1941

It is agreed by and between the plaintiffs and the defendant in the above cause, by and through their respective attorneys of record, that the following stipulation of facts shall be and constitute an agreed statement of facts on the submission or trial of said cause, and that the Court shall [fol. 64] consider the same, insofar as material, as fully and completely as if testified to or introduced as evidence under the ordinary rules of evidence. Either party may introduce additional evidence on the hearing of said cause should it desire to do so.

Such stipulation and agreed statement of facts is as follows:

1. The transcript of proceedings before the State Department of Revenue as certified by Julia Klinge, Secretary of the State Department of Revenue, under date of May 26, 1941, and filed in this cause is a true and correct copy of the proceedings had before said Department relating to the assessment involved in this cause, and that such certified transcript shall, upon said trial, be introduced in evidence and considered by the Court. The stipulation contained in this paragraph, however, shall not be construed as an admission by the plaintiffs, or either of them, of the legality or validity of the assessment shown therein, nor the liability for the tax, penalty or interest thereon mentioned in said assessment, nor as a waiver by the plaintiffs, or either of them, or any right with respect to any liability or purported liability of the said Dunn Construction Company, Inc., and John S. Hodgson and Company, either for the payment of any sales tax or use tax to the State of Alabama, nor as a waiver of any rights of the United States to contest such assessment, or liability or the validity thereof, or the validity of any Act imposing or purporting to impose such tax.

2. That Exhibit "C" attached to the amended petition for declaratory judgment filed in this cause is a true and correct copy of the contract entered into by and between the United States of America and said Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership, on the 9th day of September, 1940, and which contract, it is agreed, was in full force and effect during the period covered by the assessment hereinabove mentioned and involved in said cause; and which contract was executed for the construction of certain buildings and improvements mentioned in said contract, pursuant to and under the authority of the Acts of Congress mentioned in said contract, namely, Public No. 611, 76th Congress, approved June 13, 1940, and Public No. 703, 76th Congress, approved July 2, 1940.

3. That the Dunn Construction Company, Inc., is a Corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Alabama at Birmingham, Alabama, in which corporation the United

States owns no interest, and that John S. Hodgson and [fol. 65] Company is a partnership composed of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham, Alabama, and the said plaintiff, Dunn Construction Company, Inc., and John S. Hodgson and Company, (hereinafter called the partnership), in the execution and performance of said contract aforementioned, were acting jointly as members of a co-venture.

4. That the purchase, storage, use or other consumptions of tangible personal property involved in this cause, were made pursuant to and in the performance of the aforesaid contract with the United States entered into on the 9th day of September, 1940, and in and about the construction by said partnership of a complete tent camp, together with the necessary buildings, utilities and appurtenances specifically mentioned and described in Article I, Subsection 1, of said contract; all of which buildings and improvements were constructed or located upon Fort McClellan in Calhoun County in the State of Alabama.

5. That said Fort McClellan is located upon and constitutes an area situated in Calhoun County in the State of Alabama. That in the year 1918, the lands comprising such area now known as Fort McClellan were acquired by the United States of America by purchase from the individual owners of such lands, and that the deeds thereto from such owners were duly executed and delivered to the United States in the year 1918, which deed conveyed or purported to convey therein a fee simple title to said lands; and that since such acquisition thereof the United States has continuously used such area as a military reservation, or fort; and that all of the buildings and improvements mentioned in said contract executed under date of September 9, 1940, were constructed or required to be constructed upon such area known and hereinafter referred to as Fort McClellan (not including the acquisitions of the United States subsequent to November 18, 1940 for maneuver purposes, which additional areas are not involved herein.)

6. That all of the tangible personal property, the storage, use or consumption of which is involved in the hereinabove mentioned assessment of use tax made by the State Department of Revenue against said plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, was purchased, shipped, delivered, paid for, stored,

used or consumed and reimbursement therefor made in substantially the same manner as hereinafter set forth and stated with respect to certain building material, namely, roofing, purchased from Certainteed Products Corporation [fol. 66] of Atlanta, Georgia, (except for the difference in the name of the vendor and the location of such vendor, and the point of origin or shipment of such tangible personal property from points outside the State of Alabama to said Fort McClellan).

7. (a) That, pursuant to a proposal previously submitted by Certainteed Products Corporation of New York, N. Y., to said partnership to sell a certain large amount of roofing material at a stipulated price, which proposal had been submitted by the partnership to the Constructing Quartermaster at Fort McClellan for his approval, and which had been approved by him, said partnership on January 15, 1941, prepared and submitted to the Constructing Quartermaster a paper or document of which Exhibit "1" hereto attached is a true and correct copy and requested the approval by said Constructing Quartermaster of such purchase, which approval was endorsed thereon, as shown by said Exhibit "1" hereto attached as a part of this agreement. That Raymond P. Reeves, whose name appears on said Exhibit "1", was an employee of the partnership aforesaid.

(b) That thereafter on January 16, 1941, the partnership submitted to said Certainteed Products Corporation an order for the material described in Exhibit "1", as shown by a copy of such order attached hereto marked exhibit "2" and made a part hereof, said order being sent to the Atlanta, Georgia, office of said Certainteed Products Corporation. That the said Raymond P. Reeves, whose name appears on said Exhibit "2" was an employee of the partnership aforesaid, and was the duly authorized agent of said partnership.

(c) That upon receipt of said purchase order mentioned in Subsection (b) of this paragraph, the Certainteed Products Corporation shipped said material therein described as directed therein by freight from Atlanta, Georgia, to "United States Construction Quartermaster, at Fort McClellan, Ala. Account of Dunn Construction Company, Inc., and John S. Hodgson & Company."

(d) That on January 20, 1941, said materials so shipped by Certainteed Products Corporation arrived at Fort McClellan in Southern Railroad Car 13975, which car was placed at the siding within said Fort McClellan where such materials were unloaded from said car. At the time said materials were unloaded, they were inspected and two reports thereof were made, one as shown by a report entitled "Receiving and Inspection Report", a copy of which is shown by Exhibit "3A" hereto attached and made a part of this agreement, and which was a report required to be made by the Constructing Quartermaster, and which report was [fol. 67] signed by Fred McNaron and A. L. Arendale in their respective capacities as above stated. That the words "General Warehouse" mentioned in said Exhibit "3A" referred to a general warehouse which belonged to the United States, and which is located within said Fort McClellan, and which warehouse was used for the storage of materials purchased in connection with the performance of said contract. That as and when the partnership aforesaid required said materials in such construction work, the same were withdrawn by them and used in such construction work in the performance of said contract hereinabove mentioned.

(e) That Exhibit "4" attached hereto and made a part hereof is a true and correct copy of the original invoice of the Certainteed Products Corporation to the partnership aforesaid on account of the purchase hereinabove described, and of certain endorsements noted thereon. The endorsements made on this Exhibit were made thereon by the parties indicated, in the capacity indicated, and all appear upon the original of said invoice.

(f) That the invoice of the Certainteed Products Corporation mentioned in the foregoing sub-paragraph was received by said partnership on February 8, 1941, and on February 20, 1941, that invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster for his approval for payment by said partnership of said invoice, all of which will appear from Exhibit "5" hereto attached and made a part hereof, which is a true and correct copy of the original invoice transmittal, and that the said invoice was approved for payment.

(g) That thereafter, within 48 hours from the date of such approval, said partnership, namely, Dunn Construc-

tion Company, Inc., and John S. Hodgson and Company, issued their joint check payable to the Certainteed Products Corporation at its New York Office, in full payment of said invoice marked Exhibit "4", said check being drawn in the amount of \$221.72, being the amount of \$226.25, less 2 per centum discount, which check was drawn upon a joint account or deposit in The First National Bank of Anniston, Alabama, and which check upon presentation was paid in due course.

(h) That thereafter, on March 5, 1941, the partnership aforesaid submitted its voucher number 742, a true and correct copy of which is marked Exhibit "6", attached hereto, and made a part hereof, to the United States War Department through the Constructing Quartermaster, for reimbursement for its expenditures aggregating \$9,465.76, and [fol. 68] including its expenditure of \$221.72 made to the Certainteed Products Corporation as aforesaid in and about the purchase of roofing material hereinabove mentioned, but which voucher did not include any amount for Alabama sales or use tax thereon or with respect thereto, no such tax having been paid by the partnership or by the vendor of said material.

(i) That thereafter, the Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved said voucher for payment, and on March 11, 1941, said voucher number 742 of which Exhibit "6" is a true and correct copy, was paid by the Finance Office at Fort McClellan, Alabama, to said partnership by United States Government Check dated March 11, 1941, being check No. 31,136, and for the sum of \$9,477.88, payable to said partnership, which said check was in payment of voucher Number 742 of which Exhibit "6" attached hereto is a true and correct copy, and payment of another voucher submitted by said partnership in a similar matter, but which is not pertinent hereto.

(j) That in submitting voucher Number 742 above mentioned for payment, which included the request for reimbursement for the partnership's payment to the Certainteed Products Corporation as aforesaid, the partnership supported its voucher by attaching thereto its request made to the Quartermaster for approval of said purchase, bearing the approval of said Quartermaster for said purchase, a copy of which is attached hereto as Exhibit 1, copies of

its purchase order to the Certainteed Products Corporation, a copy of which is attached hereto as Exhibit 2, the two receiving and inspection reports heretofore mentioned copies of which are attached hereto as Exhibits "3" and "3A", and said invoice of the Certainteed Products Corporation a copy of which is attached hereto as Exhibit "4".

8. It is further stipulated and agreed that the Certainteed Products Corporation maintains no place of business in the State of Alabama and that materials mentioned and described in the foregoing paragraphs of this stipulation were shipped by said Certainteed Products Corporation from the City of Atlanta, State of Georgia, to Fort McClellan, Alabama.

9. It is further stipulated and agreed that the Certainteed Products Corporation has not paid to the State of Alabama any use or sales tax with respect to either the sale, storage, use or other consumption of said material; that the vendors of other tangible personal property involved in said assessment had no place of business within this State, and such property shipped by them was shipped from points outside of this State, in a similar manner, as that shipped by the Certainteed Products Corporation, and [fol. 69] no sales or use tax has been paid thereon by such vendors.

10. It is further stipulated and agreed that the partnership aforesaid made no return to the Department of Revenue of the State of Alabama of the three transactions which are in controversy in this case for either Alabama sales or use tax purposes.

11. It is further stipulated and agreed that as shown by the protest made by the partnership aforesaid, as it appears in the transcript of these proceedings before the Department of Revenue of the State of Alabama, the tax paid by the partnership aforesaid on account of the transactions involved in these proceedings was paid under protest. That said tangible personal property was used in the manner herein stated, in the performance of the aforesaid contract during the tax period mentioned in said assessment, namely, from January 1, 1941, to March 31, 1941.

12. It is further stipulated and agreed that substantially all of the material purchased in connection with the performance of the above-mentioned contract was purchased, paid for and reimbursed in the manner above stated, except

that some of such other purchases were made within the State of Alabama from vendors engaged in business in this State. However, in some instances not involved in the assessment hereinabove mentioned, competitive bids for materials required for the performance of said contract were called for by the Quartermaster General of the United States and after the acceptance of one of the bids received in response to such call, the Quartermaster General informed the Constructing Company and the partnership of such acceptance and requested or directed the partnership above mentioned to purchase said materials from said competitive bidder for and in connection with the performance of said contract, which purchase was thereafter handled in the same manner as if said bid had been originally submitted to said partnership, and said materials were paid for by said partnership and bills for reimbursement therefor were submitted, approved and paid to said partnership in the same manner as in the case of the typical transaction hereinabove mentioned in detail.

It is further stipulated and agreed that the Constructing Quartermaster at Fort McClellan was the representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermasters Corps, United States Army and that said Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the said Contracting Officer in all matters pertaining to the performance of the contract mentioned in paragraph 2, a true copy of which is attached to the amended petition [fol. 70] for a declaratory judgment, and marked Exhibit "C".

It is further stipulated and agreed that the plaintiffs, Dunn Construction Company, Inc., and John S. Hodgson and Company, a partnership have made demand upon the United States through the Construction Quartermaster and the Quartermaster General for reimbursement to it for the amount of said taxes paid by the partnership to the State of Alabama, the same being taxes assessed against it by the State of Alabama under the provisions of the Alabama Use Tax Act No. 67 of the General Acts of Alabama, Regular Session, 1939, page 96, paid by the partnership under protest.

Thomas D. Samford, United States Attorney; Samuel O. Clark, Jr., Assistant Attorney General, Attorneys for the Plaintiffs. Thomas S. Lawson, At-

torney General of the State of Alabama; John W. Lapsley, Assistant Attorney General of the State of Alabama; J. Edward Thornton, Assistant Attorney General of the State of Alabama, Attorneys for John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama.

EXHIBIT "1" TO AGREED STATEMENT OF FACTS

Request No. 5689

Date 1-15-41

Dunn Construction Company
and

John S. Hodgson & Company

Request for Purchase

To: Purchasing Agent.

It is requested that the following be purchased for use as indicated:

(Signed) Thos. G. Walmsly, by C. H. Strawn.

Item No.	Quantity	Unit	Article	Job No.	Bids Received 3 Price
1	125	Rolls	Prepared Roll Roofing, Mineral Surface, Color, Green Wt. Approx. 95# per roll @ 1.81 each	1-3211	226.25
For Hospital Area					
Deliver to General Warehouse					
Certified a true copy.					
Thomas H. Doyle, Captain QMC					
2% 10					
					\$226.25 PH

[fol. 71]

Bidders

Name

Address

1. Certainteed Prod. Corp.
Approved for purchase.

Atlanta, Georgia

Issue purchase orders as indicated
above.

(S) Thomas H. Doyle, Capt. QMC

(Stamped) Raymond P. Reeves
Purchasing Agent

For: S. C. MacIntire, Jr.
Major, QMC
Constructing Quartermaster

EXHIBIT "2" TO AGREED STATEMENT OF FACTS

Dunn Construction Co., Inc.

and

John S. Hodgson & Company
Contractors

Fort McClellan, Ala.

P. O. No. 2361

Req. No. 3589

Date January 16, 1941.

To Certainteed Products Corporation.

Address, Atlanta, Georgia.

Please enter the following order in accordance with the conditions and terms of your accepted bid and/or contract dated — — —, and in conformity with conditions and instructions on the reverse side.

Item No.	Description	Quantity	Unit	Unit Price	Amount
1	Prepared Roll Roofing, Mineral Surface, Color Green, Weight approximately 95# per roll	125	roll	1.81	\$226.25
	Total				\$226.25

Certified, A true copy.

Thomas H. Doyle
Captain, QMC

Ship to: United States Constructing Quartermaster
At: Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co.

Ship by Best Way Via — F. O. B. Fort McClellan, Alabama.

Terms: Net — Days, less 2% 10 Days. Shipments must start by and be completed by Immediately, Mark Packages, Cases, Etc., with above Purchase order Number, Special Number of Each Package, weight of Each package, Vendor's name, and the following special Markings. General Warehouse.

RPR;fm.

Important; See reverse side of this Sheet

Dunn Construction Co. Inc. and John S. Hodgson & Co., (S.) Raymond P. Reeves, Purchasing Agent.

[fol. 72] (reverse side of invoice)

This order is placed for the benefit of, and is assignable, to the United States Government.

This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

Terms of Payment as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice.

The following Instructions must be followed Explicitly:

1. Acknowledge receipt of this Purchase Order. Unless acknowledged Immediately we reserve the right to cancel.

2. Immediately upon shipment made to Dunn Construction Co. Inc., and John S. Hodgson & Co., at Fort McClellan, Ala.

A. Original and Two (2) copies of Bill of Lading (or shipping papers) Bills of Lading, etc., must read:

UNITED STATES CONSTRUCTING QUARTERMASTER

At Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company. and must also bear Purchase Order Number.

B. Six (6) copies of invoice, properly filled and certified as follows:

I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice, have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

— —, Title.

3. Render Separate invoices for each and every shipment.

4. Make no changes in filling this Purchase Order as to quantities, descriptions, prices, f. o. b. points, etc., except upon direct authority from our Purchasing Department.

[fol. 73] 5. Immediately upon shipping mail to the contractor 3 copies of tally and shipping memo; enclose tally or shipping memo in each package or tack same inside each car door.

Full Compliance With the Above Will Expedite Payment.

EXHIBIT "3" TO AGREED STATEMENT OF FACTS

Receiving and Inspection Report

Date Received 1-20, 1940 via Frt.

(?)

Vendor *Certainteed Products Shipped from Atlanta Ga.

Car No. Sou 19375

Quantity	Unit	Description
125	Rolls	90# Lawn Green Roofing

*Certainteed Products Corp., Savannah, Ga.

Certified

A True Copy

Thomas H. Doyle,

Captain, QMC

Constructing Quartermaster

(S.) Fred McNaron

Received by

(2) A. L. Arendale

Checker

P. O. No. 2361 Date 1-16, 1941 Checked by H

Invoice No. 4623 Date 1-20, 1941 Checked by H

EXHIBIT "3A" TO AGREED STATEMENT OF FACTS

Receiving and Inspection Report

Date Received 1 194

Vendor Certainteed Products Corp—Campbell Coa Co. Shipped from Atlanta, Ga.

Car No. Sou 13975

S #1

Location	Quantity	Unit	Description
General Warehouse	125	Rolls	Green Roofing

General

Warehouse

125

Rolls

Green Roofing
90 Lbs. to Roll

Certified a true copy

Thomas H. Doyle, Captain, QMC

Received, Inspected & Accepted (except as noted)

Date 1/20/41 — Signed B. W. L., Storkeeper — Area No. L

[fol. 74]

Received by: Inspected by
 (s) Fred McNaron (s) E. L. Arendale
 Checker Inspector

P. O. No. 2361

EXHIBIT "4" TO AGREED STATEMENT OF FACTS

Certain-Teed Products Corporation
 100 East 42nd Street
 New York, N. Y.

Original

Invoice No. 4623
 Page 129
 Entered Line 27
 By R.

256-003

Sold to: Dunn Construction Co., Inc. &
 John Hodgson & Co. 2
 Ft. McClellan, Ala. 1

Invoice Date Jan. 20, 1941

Ship to Same—S/O at Atlanta
 Ga.

Ordered 1/16

Nifty—Campbell Coal Co.
 Your N6. P. O. 2361 S. O. No. at 300 Salesman 8216 Johnson Shipt From Pt.

Went 7

Terms 25 10 days net 30 days Car No. Sou 13975 Date Shipt 1/16
 Route S & A Ga. Invoice No. 3999

F. O. B. Pt. Wentworth—full frt alld & ppd

Quan- tity	Unit	Commodity	Com. Code	Weight	Price	Amt. Total
125	Rls	To come out at Dest— 90# SLT RFG—CPTE 1 Gr • to meet Fed. Specs— SS-R-521	11612	11375	1.81	226.25
			Less 2% discount			4.53
			Net amount Paid			\$221.72

Shipt with order # 72006-72001-22-25
 (4000)

I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated, herein all unmanufactured articles, materials or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials or supplies have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Firm Name Certain-Teed Products Corporation, Per (s) S. J. Wood
Dist. Credit Manager

Certified a true copy

P. O. No. 2361
Purpose No. 3211 Amt. 221.72
QM-7085

Thomas H. Doyle, Captain, QMC

Certified Correct
J. P. Anderson
Chief Fiscal Accountant

(fol. 75)

Field Audit

Quantity checked by D.B.W.
Prices checked by D.B.W.
Extensions checked by H.

Entered:

On Purchase order by D.B.W.
On Inv. Register by W. J. W.
Approved for \$221.72
By Signed B. B. Uhler, Chief Material Inspector.
By Signed E. D. Proctor
Field Auditor

EXHIBIT "5" TO AGREED STATEMENT OF FACTS

Dunn Construction Co. Inc.

And

John S. Hodgson & Company

No 138

Invoice Transmittal

Date February 20th, 1941

To: Constructing Quartermaster
Attention of Field Auditor

The following invoices are submitted herewith for approval of payment:

Invoice No.	Date	P. O. No.	QM 7065	Vendor	Amount
1599	9-26-40	35		Matthews Electric Supply Co.	43.00
3461	9-26-40	35 81		"	423.60
2807	11-26-40	965		Noland Company	884.89
2945	12-6-40	965		"	143.29
3358	12-24-40	1212		"	73.05
3990	12-31-40	2383		"	36.02
4283	1-18-41	2466		"	5.00
4284	1-18-41	2286		"	28.56
4468	1-25-41	2205		"	101.28
4473	1-27-41	2284		"	23.55
4547	1-31-41	2359		"	47.75
4597	12-31-40	2284		"	75
4652	1-29-41	1021		"	3.39
4640	2-7-41	2359		"	8.25
4669	2-12-41	2246		"	372.85
4670	2-12-41	2467		"	41.65
4671	2-12-41	2380		"	9.90
4692	2-12-41	2244		"	905.20
1908	10-14-40	1380		John B. Lagarde, Jr.	23.00
2485	10-21-40	561		"	8.50

[fol. 76]

4237	9-30-40	44	John B. Lagarde, Jr.	20.25
4238	10- 8-40	44	" " "	73.70
4239	10-10-40	44	" " "	250.58
4240	10-14-40	44	" " "	73.70
4241	10-15-40	44	" " "	44.22
4242	10-16-40	44	" " "	51.59
4243	10-19-40	44	" " "	16.00
4244	10-22-40	44	" " "	14.74
4245	10-25-40	44	" " "	16.00
4246	10-30-40	44	" " "	16.00
4247	11-14-40	44	" " "	16.00
4435	11- 5-40	44	" " "	436.00
1706	10-31-40	1035	J. D. Pittman Tractor Company	326.17
2910	12- 1-40	1390	Henry H. Booth	19.85
4623	1-20-41	2361	Certain-teed Products Corp.	226.25
4629	11- 6-40	1065	Callahan Grinding & Machine Co.	2.75
4697	2-15-41	2295	Birmingham Slag Company	431.20

Certified a true Copy

Thomas H. Doyle

Total

5,249.68

Previous Totals Accumulated

1,771,998.34

Accumulated Totals to Date

1,777,243.02

Received the Above Invoices

Constructing Quartermaster
(Signed) W. H. Morton, Jr.Dunn Construction Co., Inc.
and John S. Hodgson & Co.
(Signed) J. P. Anderson

EXHIBIT "6" TO AGREED STATEMENT OF FACTS

U. S. War Department

Voucher No. 763

Voucher prepared
at Fort McClellan, Ala. 3-5-41D. O. Vou. no. 1474
Bu. Vou. No. 763

The United States, Dr.

To Dunn Construction Co., Inc., & John S. Hodgson & Co.
Address Fort McClellan, Alabama.

Balance brought forward

Total

Amount
9,465.76
9,465.76

[fol. 77]

Certified

A True Copy

Thomas H. Doyle, Captain, Q.M.C.

I hereby certify that the above bill is correct and just; that payment therefor has not been received; and that except as otherwise noted all of the articles, materials, and supplies furnished under purchase order No. — if unmanufactured articles, materials, and supplies, have been mined or produced in the United States, and if manufactured articles, materials, and supplies they have been manufactured in the United States substantially all from

articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed.

Payee Dunn Construction Co. Inc. & John S. Hodgson & Co.

Per (S.) H. A. Gholson, Title Chief Accountant.

Contract No. W-6119 qm-161. Date 9-9-40.

Pursuant to authority vested in me, I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the services were performed as stated; that they were propounded under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without writtin contrast, in open market, and with or without advertising, under the circumstances stated in No. — of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

(W.) Wm. H. Ball, Major, Q. M. C., Title Constructing Quartermaster.

Approved for \$9,465.76. (S.) E. D. Proctor, Field Auditor.

Accounting Classification

Appropriation, limitation or project symbol		Limit'n or Proj't amount	Appropriation Amount
21x1738	Construction of Buildings; Utilities and Appurtenance at Military Post; Emergency Construction. No. year. (See form 35-A attached.)	9,465.76	9,465.76

[fol. 78] Public Voucher for Purchases, and Services
Other Than Personal

Continuation Sheet

U. S. War Department:
Our Invoice No.

944	Moore Handley Hardware Co.....	136.37
1451	Delrymple Equipment Co.....	53.38
3455	Stoelker Equipment Co.....	102.00
4153	The Goodyear Tire & Rubber Co.....	4.50
4468	Noland Company, Inc.....	99.25
4547	Noland Company, Inc.....	46.79
4391	J. D. Pittman Tractor Co., Inc.....	133.80
4623	Certain-teed Products Corporation.....	221.72
4640	Noland Company, Inc.....	8.08
4653	The Young and Vann Supply Co.....	22.33
4662	Philadelphia Tranrail Co.....	7,573.50
4672	Noland Company, Inc.....	103.21
4675	Anniston Machine Works.....	16.07
4697	Birmingham Slag Co.....	431.20
4702	Birmingham Slag Co.....	136.76
4703	The Geo. F. Wheslock Co.....	17.46
4709	John B. Lagarde, Jr.....	108.04
4710	John B. Lagarde, Jr.....	39.87
4711	John B. Lagarde, Jr.....	48.51
4714	John B. Lagarde, Jr.....	6.86
4715	John B. Lagarde, Jr.....	49.73
4716	John B. Lagarde, Jr.....	13.72
4717	John B. Lagarde, Jr.....	79.38
4718	John B. Lagarde, Jr.....	22.05

Certified a True Copy

Thomas H. Doyle, Capt. Q.M.C.

Total

9,465.76

Analysis of Vouchers

Appropriation Title

21x1738—Construction of	Qm-7085	P1-3211	A1738N	8,571.91
Buildings, Utilities and	QM-7085	P1-3212	A1738N	877.78
Appurtenances at Military Posts.	Qm-7085	P1-3213	A1738N	16.07
Emergency Construction. No. Year.				

[fol. 79] Certified a True Copy

Thomas H. Doyle Capt. Q.M.C.

[fol. 80] IN CIRCUIT COURT OF MONTGOMERY COUNTY

Statement of Evidence

MAJOR S. C. MACINTIRE, JR., being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. S. C. MacIntire.

Q. Your age, please, sir?

A. Fifty-one.

Q. Your present residence?

A. Decatur, Georgia.

Q. Your present occupation?

A. Soldier.

Q. With what part of the Army are you connected?

A. Quartermaster Corps.

Q. How long have you been with the Quartermaster Corps?

A. Since last August.

Q. What capacity do you hold with the Quartermaster Corps?

A. You mean rank, or do you mean——

Q. (Interposing): Job.

Mr. Green: Rank and duties.

Q. Rank and duties?

A. I was assigned to Constructing Quartermaster, as a Major. This just covers this present active-duty period, see?

Q. You are Constructing Quartermaster on what job?

A. Now?

Q. Then?

A. Fort McClellan.

Q. Did you know Mr. John Hodgson?

A. Yes.

Q. Did you deal directly with him while you were Constructing Quartermaster at Fort McClellan in connection with the performance of this contract which Dunn Construction Company, Incorporated, and John S. Hodgson & Company had with the Government for the construction of a tent camp and other buildings at Fort McClellan?

A. Yes.

Q. I hand you a document marked Exhibit A and ask you if you have ever seen that document, or a copy of it, before?

A. Yes. This is the guide and instructions to Constructing Quartermasters covering fixed-fee project operation.

[fol. 81] Q. How did you come into possession of this?

A. It was forwarded to me by the Quartermaster General's office in Washington, for distribution on the job.

Q. By whom was it prepared and issued?

A. Issued by the Quartermaster General in the Construction Division. And it came to my office—those forms came

to my office, I believe either five or six copies; and we were instructed to distribute them to the contractor and to the architect-engineer, so we were all conversant with the instructions.

Q. Did you deliver one of the copies to the constructing contractors on the job at Fort McClellan?

A. Yes; to the contractors and to the engineers, both.

Q. Did you, in your capacity as Constructing Quartermaster, follow the directions and procedures which are set forth in this "Supplement to guide for Constructing Quartermasters"?

A. I believe—

Mr. Lapsley (interposing): Your honor—

The Court: Hold just a second. What is the ground of objection?

Mr. Lapsley: We object to that question specially on the ground that it calls for incompetent, irrelevant and immaterial testimony, conclusion of the witness—

The Court (interposing): Can you out-talk that fan just a little bit?

Mr. Lapsley: Incompetent, irrelevant, immaterial, and calls for a conclusion of the witness; and, further, that it calls for evidence which is not pertinent to any issue in this case; and, another ground, that it is an attempt to alter or vary the terms of a written contract, by parol.

The Court: I will let it in and give you an exception to the Court's ruling. Now you can answer it.

Witness: Do I—

The Court: You can answer now.

Witness: Answer the question?

The Court: Yes.

A. Well, as nearly as it was possible to follow this, but the Constructing Quartermaster is given discretionary powers in certain things to make routine decisions, which I exercised in many cases.

Q. But that power of discretion that you exercised is given you in these instructions?

A. That's right. The authority is in there. I didn't have to run to Washington with every decision that I made.

[fol. 82] Q. How long did the instructions that are set forth in this Guide remain in force and effect?

A. Well, now, that leads me off on what I was trying to say: That was in effect until these came out, but I didn't

want the impression to go into the record that there were no other instructions that came out in the interim.

Q. What other instructions came out in the interim?

A. Well, it is continuous. These Construction Division letters come out continuously, probably a dozen a week or more, and they are in some cases instructions on things that have nothing to do with the manual; but, however, I didn't want you to get it in the record that stopped everything until this came out. You see, there's also zone letters that come out, that are instructions, as things develop.

Q. The instructions that you say came out from time to time were all incidental in nature?

A. Oh, yes; or they could have been on lump-sum contractors, or anything.

Q. But they did not change substantially the procedures—

A. (interposing): Not at all. Not at all, no. But you see in your original question to me you asked me apparently whether there was a gap of any kind between these two, and there was.

Q. When was the new Manual for the Construction Division, Office of the Quartermaster, with instructions to Constructing Quartermasters, issued?

A. It was issued under the date of March 19, 1941.

Mr. Mickey: I offer in evidence Exhibit A, entitled "Supplement to Guide for Constructing Quartermasters, revised 1940, covering fixed fee projects", dated August 27, 1940.

Mr. Lapsley: We wish to object to the introduction of this document.

The Court: Why don't you do this: Follow this rule: Unless you specially object—

Mr. Lapsley (interposing): I will put my grounds in.

The Court: Yes, put your grounds in, and any other grounds, if you don't assign any.

Mr. Green: It will stand on that same objection. The objection shows it relates to all of them.

The Court: Well, it is in.

Mr. Thornton: Judge, did we understand you overrule the objection?

The Court: Yes.

Q. Major MacIntire, I hand you a document marked Ex-
[fol. 83] hibit B, entitled "Fixed Fee Letter No. 5", and ask

you if you have ever seen that letter, or a copy of that letter, before?

A. Yes. This is a circular letter that came out to all Constructing Quartermasters.

Q. From whom?

A. From the office of the Quartermaster General, and it is signed by Captain Kirkpatrick, who was at that time an assistant in the Fixed Fee Section.

Q. This is an illustration of the type of letter which you say came out—

A. (interposing): That's correct.

Q. (continuing): * * * in addition to the—

A. (interposing): That's correct.

Q. (continuing): * * * instructions in the Guide. Approximately when did that document reach you? When did you receive a copy of that?

A. Well, it would be difficult for me to fix the date. I'm surprised that this isn't dated.

Q. Approximately?

A. Well, I would say it must have come out in October. About October of 1940.

Q. Did you receive copies of that which were transmitted by you to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in your capacity as Constructing Quartermaster?

A. I can't answer that question, because I don't know. The procedure would have been, yes. But whether that was actually delivered, I have no way of knowing. I have no receipt for them.

Q. But in the usual course of routine, you would have received copies of that—

Mr. Green: He answered that question. He said yes, he would have in normal course delivered it.

Witness: Yes.

Mr. Mickey: I offer in evidence Exhibit B.

Mr. Lapsley: You got a B on it?

The Court: Yes.

Mr. Thornton: We object to it. Reserve the right to assign grounds.

The Court: Yes. Same ruling and same exception.

Q. I show you exhibit marked Exhibit C, entitled "Construction Division Letter No. 101", dated February 19, 1941—

A. (interposing): That's correct, yes.

[fol. 84] Q. (Continuing:) —and ask you if that is a copy of letter you received from the office of the Quartermaster General in Washington, D. C.?

A. That's correct.

Q. In your capacity as Constructing Quartermaster and—

A. (Interposing): May I interrupt? I wasn't at Fort McClellan when this letter was received. I received this letter in Atlanta at my present assignment. You see, I reported there the 18th of February. This is the 19th of February.

Q. This is a general letter which you would have received?

A. That's right. You see, this went to all Constructing Quartermasters. You see, Captain Doyle was there when he got that. He relieved (witness stopped).

Mr. Green: Have you any questions, Mr. Lapsley?

Mr. Lapsley: No.

Witness excused.

CAPTAIN THOMAS H. DOYLE, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. Will you state your name, please?

A. Thomas H. Doyle.

Q. You are at present Constructing Quartermaster at Fort McClellan?

A. Yes.

Q. Have you ever seen a copy of this document, marked Exhibit C?

A. Yes.

Q. Have you applied the instructions and directions given to Constructing Quartermasters thereby at Fort McClellan?

Mr. Lapsley: We object to that.

Mr. Green: And to—wait; let him finish the question. And—

Q. And to Dunn Construction Company, Incorporated, and John S. Hodgson & Company?

A. Yes.

Mr. Lapsley: We object to that.

The Court: Yes. Same ruling. Same thing.

Mr. Green: Now introduce it in evidence.

[fol. 85] Mr. Mickey: I offer Exhibit C in evidence.

Mr. Green: That's all, Captain.

Mr. Thornton: And we have an exception. We object.

The Court: Yes.

Mr. Thornton: We object, with leave to assign all grounds applicable.

The Court: Oh, yes.

Witness excused.

Mr. JOHN S. HODGSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mickey:

Q. You are John S. Hodgson, age thirty-eight, one of the partners of John S. Hodgson & Company, which is associated with Dunn Construction Company, Incorporated, as a partner, or co-venturer, in a contract dated September 9, 1940, a copy of which is attached to the petition for a declaratory judgment filed in this case?

A. Yes.

By Mr. Green:

Q. In the course of the performance by Dunn Construction Company and John S. Hodgson & Company of that contract, did you, in the behalf of the co-venture, receive, through the Constructing Quartermaster on duty at that Post, copies of the documents which I hand to you, and which are marked, respectively, Exhibit A, Exhibit B, and Exhibit C?

A. Yes.

Mr. Mickey: That's all.

Mr. Green: Wait a minute. No, it is not all.

Q. Why were these documents, if you know, delivered to you by the Constructing Quartermaster?

Mr. Lapsley: We object to that.

Mr. Green: Understand that. Understand that.

Mr. Thornton: We object to that, with leave to assign grounds—is that the same agreement—

The Court: Yes. Same rule.

Mr. Thornton: All right. With leave to assign grounds.

[fol. 86] The Court: Any additional grounds you want. All right. You can answer.

A. Because they pertain to the operation of this contract.

Q. Whose operation?

A. They pertain to the operation of the Constructing Quartermaster, the engineers, and the contractors.

Q. And by contractor you mean particularly to the co-venture of Dunn Construction Company, Incorporated, and John S. Hodgson & Company, in the performance of its contract of September 9, 1940, which has been mentioned above?

A. Yes, sir.

Q. Did you apply the instructions contained in those several exhibits to your operations, in the performance of your contract?

Mr. Lapsley: We object.

The Court: Same ruling. Let it in, and you have an exception.

A. We did.

Q. I hand you what purports to be—I hand you a photostatic copy of what purports to be a conference held with the Dunn Construction Company and John S. Hodgson & Company in Room 2241, Munitions Building, Washington, D. C., on September 6, 1940, between Mr. Dunn and yourself; and Lieutenant-Colonel E. G. Thomas and Mr. Loving and Mr. O'Brien, all representing the Government, relative to the construction of Camp McClellan, Alabama, and ask you if you have ever seen—if that is a true copy of any paper which you have ever seen?

Mr. Lapsley: Now, we object to that question.

The Court: Overrule it and give you an exception. I presume it is a true copy?

A. I haven't read it in detail, but I remember the conference.

The Court: So far as you know—

Witness (Interposing): In my opinion, it is a true copy.

Q. In your opinion, it is a true copy of that conference?

A. Yes, sir.

Q. You know why the conference was held?

Mr. Lapsley: We object to that.

The Court: "Know *why* the conference was held"?

Mr. Green: Yes, sir.

The Court: Overrule and let it in, and give you (Mr. Lapsley) an exception.

A. For the purpose of discussing a proposed contract for [fol. 87] the construction of the camp at Camp McClellan.

Q. And by that proposed contract, you mean a proposed contract to be entered into by Dunn Construction Company and John S. Hodgson & Company with the United States?

A. Yes, sir.

Q. Was such a contract consummated pursuant to this conference?

Mr. Lapsley: We object.

The Court: Overrule, and give you an exception.

A. It was.

Q. Is that the contract which you have seen filed in this case as an exhibit attached to the petition for a declaratory judgment, filed in your name and in the name of the United States?

A. Yes, sir.

Mr. Green: We introduce this in evidence and mark it Exhibit D.

Mr. Lapsley: And we object to the introduction of this, on like grounds, and everything—

The Court (Interposing): Yes.

Cross-examination.

Mr. Lapsley:

Q. I want to ask you, Mr. Hodgson, as nearly as you can state, when did you receive copies of the papers referred to and marked as Exhibits A, B and C?

A. During the course of construction. The first of these began coming out immediately after the job started, and the letters—at different times during pretty—at pretty regular intervals throughout construction.

Q. You mean after you had signed the contract and started to perform this work?

A. Yes, sir.

Mr. Thornton: Now, Judge, we would like to renew our objection at this time, and further make a motion to exclude, because it obviously appears that this is an effort to vary the terms of the written contract.

The Court: Same ruling, and same exception.

Mr. Green: I ask this question. I am not as familiar with Alabama practice as our friends here.

Mr. Lapsley: Same as Virginia.

Mr. Green: No. These papers appear to be copies. They are merely photostats, and not originals.

Mr. Lapsley: We make no objection as to whether they [fol. 88] are true copies.

The Court: Just consider them as being originals, if you want to.

Mr. Lapsley: Each one treated as originals.

Mr. Green: I want to make that statement, because if any point is taken on that, we submit a willingness now to submit duly authenticated copies.

The Court: No point on that.

Mr. Lapsley: No point on that. We concede they are copies.

Redirect examination.

By Mr. Mickey:

Q. I hand you a letter dated February 8th and marked Exhibit E, and ask you if you received that letter from the Constructing Quartermaster?

A. We did.

Mr. Mickey: We offer that Exhibit E in evidence.

Mr. Thornton: Is there something else here going in?

Mr. Mickey: Yes.

Mr. Lapsley: I didn't get through looking at all these exhibits.

Mr. Thornton: And we object to that.

The Court: Yes; and the same ruling.

Mr. Mickey: I will give you a copy.

Mr. Lapsley: Is that Exhibit E?

Mr. Mickey: That's right.

Mr. Lapsley: We object to this.

The Court: Yes. Same objection, same ruling.

Q. I hand you two papers, marked Exhibits F and G, which are letters dated November 12, 1940, and November 14, 1940, from the Constructing Quartermaster to Dunn Construction Company, Incorporated, and John S. Hodgson & Company, Fort McClellan, Alabama, and ask you if you have ever seen copies of these exhibits?

A. Yes, I have seen copies.

Q. Were the instructions given by the Constructing Quartermaster therein, followed?

A. Yes.

Mr. Mickey: I offer these Exhibits F and G in evidence.

Mr. Thornton: And note our objection, please.

The Court: Yes.

Q. I hand you a letter marked Exhibit H, dated February 17th, to the Constructing Quartermaster at Fort McClellan, Alabama, from the Project Manager of Dunn [fol. 89] Construction Company, Incorporated, and John S. Hodgson & Company, and ask you if you have seen a copy of that letter?

A. I may not have seen a copy of this particular letter.

Q. I ask you if that was a copy of a letter?

A. Wait. I may not have seen this particular letter.

Q. I ask you if that was a copy of a letter sent by Dunn Construction Company, Incorporated, and John S. Hodgson & Company, to the Constructing Quartermaster?

A. I don't remember the instance. I didn't handle that personally, but I presume it is. The man had authority to write for us—Mr. Stout.

Q. I hand you a letter marked Exhibit I, and ask you if that is a reply to said letter?

A. Yes, sir.

Mr. Thornton: Are you offering all those?

Mr. Lapsley: We object. Well, he has not offered them yet.

Mr. Thornton: Are you offering those in evidence?

Mr. Mickey: I am offering these two documents, Exhibits H and I.

Mr. Thornton: And we object to them. Object to each of those, separately.

Mr. Lapsley: Object to them.

The Court: Yes.

Mr. Mickey: That's all.

Witness excused.
 Testimony closed.

[fol. 90]

EXHIBIT "A"

**Supplement to Guide for Constructing Quartermasters
 Revised 1940
 Covering Fixed Fee Projects
 Office Quartermaster General**

August 27, 1940.

Note: The Matter Contained in the Following Pages is Intended as General Information only to Aid the Constructing Quartermasters and Their Assistants in Connection with Fixed-Fee Contracts Covering Construction Work.

40/1354

General

The following instructions pertain to supervision of work under Fixed Fee Contracts—

1. The information contained in the Guide for C. Q. M's. as revised in 1940 is, in general, applicable to construction work being performed under either a lump sum or a Fixed Fee Contract, as are the Army regulations and other War Department documents mentioned therein. The laws, this Guide, Army Regulations, and other instructions have been and will be altered from time to time and it is the responsibility of the Constructing Quartermaster to keep himself and his office informed concerning the laws and regulations under which he must operate.

2. Appended hereto is a chart showing the recent reorganization of the Construction Division O. Q. M. G.

Constructing Quartermaster:

3. All Constructing Quartermasters in the field have been [fol. 91] supplied with certain Army regulations, Federal Specifications, and other pertinent circulars and instructions or will be furnished same upon request. Any special regulations, circulars, etc. desired in addition to these should be requested by letter to this office.

4. First. In emergency construction for defense purposes, the most important element is time of completion. Speed is Essential.

5. Second. It is the duty of all Officers to see that all money is wisely and honestly expended.

6. Third. Each Constructing Quartermaster is responsible for the satisfactory completion of the job under his direction. He is expected to exercise initiative and to appreciate that he is directly responsible to the Chief of the Construction division for his operations. The Washington Office of the Construction Division will furnish Constructing Quartermasters information as to the requirements to be met, and the Constructing Quartermaster's primary duty is to fulfill these requirements and to keep the Washington Office informed by all the regular reports and by any special reports or letters considered necessary.

7. Fourth. The Engineering Branch, O. Q. M. G., will observe and review the technical features of the work of the Engineer-Architect so far as necessary and practicable without in any way delaying the progress of construction. To that end, the Constructing Quartermaster will as rapidly as possible, submit to this office, in duplicate, sketches, preliminary drawings and other data in sufficient detail to present clearly the dimensions, materials, capacities, structural features, architectural treatment and other elements proposed to be used. If the data submitted are unsatisfactory in any material degree, the Constructing Quartermaster will be notified by telephone or geograph, and will order such revisions which are at that time practicable.

8. Fifth. A Procurement and Expediting Branch has been established in the Construction Division of the Office of the Quartermaster General to centralize the purchasing and the mobilization of materials required in construction. If it appears that the normal methods of procuring and delivering material may break down to such an extent that a project will be delayed, this office should be advised immediately giving full particulars.

Special Instructions Regarding Correspondence:

9. In the following instructions "this office" refers to [fol. 92] the Construction Division which is a division of the Office of the Quartermaster General.

10. The form of address for mail shall be:

The Quartermaster General
Washington, D. C.

11. All correspondence to this office relative to construction on a Fixed Fee Basis will have the words (Fixed Fee Branch) immediately following the subject; example,

Subject: Test Portland Cement, Springfield Arsenal
(Fixed Fee Branch) Telegrams or radios should be addressed:

The Quartermaster General
Washington, D. C.

12. Each telegram to be consecutively numbered at the end thereof; Number First telegram "1" with prefix C. F. for Construction Branch Fixed Fee and then the number of the telegram or radio followed by E for the engineering branch of the Constructing Quartermaster Office.

Example: "The Quartermaster General
Washington, D. C.

C-Eight-N E Report forwarded today. C.F. One-E
Jones"

13. Every project in the field will be assigned to a Chief of Section in this office through whom all matters relating to the project will pass.

14. Depending upon the size of the project, a number of Commissioned Assistants will be ordered to report to the Constructing Quartermaster for duty. These Officers may be utilized in positions such as Executives, Property Officers, and as the Engineering representatives, etc. of the Constructing Quartermaster on the work.

15. Where necessary and considered advisable by the Constructing Quartermaster additional civilian engineering and other personnel may be employed—in accordance with regulations after obtaining the authority of this office for their employment.

16. The Constructing Quartermaster will utilize the Engineering Contractors and the Constructing Contractors engineering and other forces to the fullest extent.

17. A Field Auditor will be assigned to duty under the Constructing Quartermaster. He will be responsible for

the employment of all necessary assistants, subject to the Constructing Quartermaster's approval, and for the faithful performance of all their duties. The duties and procedure of the Field Auditor and his assistants are defined in detail below.

18. The C. Q. M. may designate any of his Commissioned Assistants as property officers. The C. Q. M. will be jointly responsible with his Property Officers and they will inform themselves as to their responsibility and keep all necessary accounts as provided by Army Regulations, and property accounts will be kept as described therein, for which purpose he may utilize his Auditing Staff. All regulations as to bonds will be complied with.

19. When the construction is being performed by the Construction Division for some branch of the War Department other than the Quartermaster Corps, an Officer from another branch of the War Department may be assigned as the Constructing Quartermaster or as his assistant. It must be clearly understood that the authority of the Construction Division is paramount, in all matters whatever pertaining to the work and the C. Q. M. is the representative of the Quartermaster General at the site of the work.

Duties of the Constructing Quartermaster:

20. The Constructing Quartermaster should read the contracts until he has become thoroughly familiar with it, and at frequent intervals read it again. He should also insist that the contractor do the same. Many unnecessary questions and much correspondence will thereby be avoided.

21. Before making or authorizing any expenditures upon the work, the Constructing Quartermaster shall first ascertain that he is authorized by this office to do so. It will be necessary at times, to begin work before plans are completed, and on verbal instructions as to the engineering features, but the Constructing Quartermaster will see that he is furnished at the earliest moment all necessary plans, specifications, and other data, and he or his representatives will advise the contractors fully as to the character of the work and the general order and manner of prosecuting it. Any verbal instructions necessary will be confirmed in writing for the protection of the Government and the Contractors.

22. The Construction Quartermaster will be responsible for the conduct of the work in accordance with the plans and specifications, these instructions and such special instructions as he may receive from this office from time to time. He will not depart from such instructions or data to any important extent without the written consent of this office, but he will be expected to make such minor changes as in his judgment are clearly necessary in the interest of expedition, quality or economy, and as to which time does [fol. 94] not permit this office to be consulted in advance. He will, however, advise this office of any such changes as promptly as possible.

The Contractor:

23. The selection of the contractors for a fixed fee contract implies, in general, confidence in his capacity, specific experience and the possession of an adequate working organization, plant and plan of operation. In case the Constructing Quartermaster shall become convinced that the contractor is deficient in any of these respects, it shall be his duty to remedy the deficiency by suggesting necessary changes or additions be made in the contractor's organization or methods or if the deficiency be serious, to consult this office without delay as to what steps should be taken.

24. Assuming the possession of an adequate organization and plan of operation by the contractors, it is understood that they will conduct the work in accordance with their usual methods, except so far as may be necessary to comply with the requirements of this office, and subject, always, to the Constructing Quartermaster's approval.

25. The contractors shall provide such superintendents, engineers, accountants, clerical help, timekeepers, material checkers, etc., as are needed to properly conduct the work, subject to the approval of the Constructing Quartermaster. He will be responsible for the employment of all necessary men, teams, and plant, and for the efficiency of all of his representatives, assistants, and employees. It will be his duty to promptly check all plans and specifications which may be furnished him. Schedules of materials may be furnished the contractor for his assistance in preparing his own lists, but he must always understand that his responsibility for prompt, full and accurate bills of material is in

no way modified by any such information, which is given solely in order to get delivery of materials started at the earliest moment.

26. It is the policy to contract on a Fixed Fee basis, for the services of Architects and Engineers as well as for construction work and this guide will apply to both types of contracts.

Materials and Equipment:

27. In purchasing material by the contractor the purchase order must always be first approved by the Constructing Quartermaster.

28. It is expected that the contractor will already have a large portion of the plant to handle the work. When a contract is awarded, the contractor shall submit to the Constructing Quartermaster, a list of the plant needed for the [fol. 95] work. The Constructing Quartermaster shall submit this list to this office and this office will furnish from available plant already owned by the Government, such items as are on hand, and shall authorize the contractor through the Constructing Quartermaster, to furnish the balance. Such plant and material, as may be necessary and available in the local markets for conducting the early operations prior to the arrival of material ordered on regular schedule, should be located by the contractor at once, and may with approval of the Constructing Quartermaster be ordered locally. A schedule of allowable rentals will be included in each construction contract.

Funds:

29. The Constructing Quartermaster should note that immediately upon acceptance of materials, they become the property of the Government under the contract. He must be prepared to reimburse the contractor promptly upon his material vouchers, to take advantage of all cash discounts. A preliminary allotment of funds to start the work will be made by this office and thereafter it shall be the duty of the Constructing Quartermaster to make the necessary request for the necessary additional funds not exceeding the amount set aside for the project in this office.

Contracts and Sub-contracts:

30. The formal contracts for this work will be executed by the Officer in charge of Construction Division. The terms and conditions under which sub-contracts can be entered into are fixed by the general contract. Forms for such sub-contracts will be furnished by this office. Sub-contracts, except for plumbing, steam heating, electrical work, and other work that can be done more economically by specialized working forces, should not be entered into unless it is found that completion of the work can be materially hastened thereby. In every case of sub-contracts, the prior approval of this office will be required. After approval of a sub-contract by this office has been sent to the Constructing Quartermaster, he shall give his written approval to the contractor, before the sub-contract is executed.

Wages:

31. Wages as determined by the Secretary of Labor under the Bacon-Davis Act will as set out in contract be paid on the project unless otherwise provided by the Contract.

Terms of the Contract:

32. The employees of the contractor, such as assistant [fol. 96] superintendents, foremen, etc., shall be subject to the approval of the Constructing Quartermaster on each project.

33. The contractor shall not attempt to secure labor at the expense of other government work. See letter OQMG—File QM 230.14 CNL, dated July 25, 1940.

Guard:

34. A military unit may be sent to the site for guard duty by the using service. The guard will be disposed of by the Commanding Officer of Troops as requested by the Constructing Quartermaster in accordance with the necessities as indicated by him. In cases where circumstances prevent the assignment of a military unit for guard duty, the Constructing Quartermaster will arrange for civilian proper guards. Barracks or any other suitable buildings that have been constructed may be used for housing the guard.

Hospital and Medical Services:

35. The contractor must provide hospital and medical services for his forces, and must comply with sanitary regulations prescribed by the Constructing Quartermaster.

Temporary Buildings:

36. Temporary buildings as needed may be constructed in accordance with appropriate mobilization or other plans by the contractor for warehousing of materials and for the housing of the Constructing Quartermasters, the Contractors, and the Finance Officer's office forces and for other purposes. Such buildings will be constructed and located in a manner making it possible for the Government to use them after they have served their purpose with the contractor.

37. Temporary housing for workmen, unless covered by the contract, will require prior approval of this office. Portions of the permanent buildings when available may be used for temporary offices by the Constructing Quartermaster. When permanent buildings are vacated, they shall be thoroughly cleansed and fumigated under the direction of a medical officer. Telephone service for Constructing Quartermasters will be secured in accordance with the provisions of Par. 13—AR 5-200.

Progress Reports:

38. Progress reports, together with ideal charts and photographs, will be furnished as called for in the guide for [fol. 97] C. Q. M.'s and by the Chiefs of Sections.

Completion Reports:

39. Completion reports as required by AR 30-1435 will be furnished at the completion of project by Constructing Quartermaster. The preparation of data for this report should be started with the beginning of the project.

40. Accurate and detailed records of all underground utilities will be maintained as the work progresses and will be kept up to date. Copies will be furnished the Post Quartermaster as well as this office as work is completed.

41. Whenever necessary to expedite the accomplishment of the defense program, purchasing officers may resort to

the execution of negotiated lump sum contracts or negotiated cost-plus-fixed-fee contracts only upon the specific authority of this office, and in accordance with the specific instructions of this office concerning the method of negotiation to be followed.

Auditing:

42. The Field Auditor is in charge of the auditing in connection with all Government construction which is under the supervision of the Constructing Quartermaster and he reports and is responsible directly to the Constructing Quartermaster. It is his duty to aid and assist the Constructing Quartermaster in seeing that the provisions of the contract are carried out and carefully to substantiate all transactions connected with the expenditure of the Government moneys in auditing procedure.

43. Matters not specifically covered herein may be found in Q. M. G. Publications, W. D. Circulars, W. D. Procurement Circulars, Finance Circulars and Army Regulations. However, in case of doubt this office should be consulted in order to determine the proper procedure.

44. The Field Auditor should bear in mind that the contractor must be reimbursed promptly for expenditures made by him and that every department of the organization must be running smoothly in order that this may be accomplished. His duty in this respect is active and not passive, and if the contractor's organization does not forward documents to him with sufficient promptness, he should take steps to bring this about.

45. He must remember at all times that the Government's accounting regulations and requirements as to auditing, are [fol. 98] far more rigid than those of commercial organizations. He must impress upon every member of his staff that their discretionary powers are limited by the stipulations of the contract and the regulations of the Field Auditor's Manual.

46. It is of utmost importance that all records be kept at all times abreast with the work. The Field Auditor is not merely keeping a set of records, but his work consists of maintaining a continuous pre-audit kept up from minute to minute. Each day all matters pertaining to the preced-

Nos. 602, 603

In the Supreme Court of the United States

OCTOBER TERM, 1941

STATE OF ALABAMA, PETITIONER

v.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM
COBB KING AND SIMON ELBERT BOOZER, AND THE
UNITED STATES OF AMERICA, INTERVENER

JOHN C. CURRY, INDIVIDUALLY AND AS COMMIS-
SIONER OF REVENUE OF THE STATE OF ALABAMA,
PETITIONER

v.

UNITED STATES OF AMERICA AND DUNN CONSTRUCT-
TION COMPANY, INC., AND JOHN S. HODGSON AND
COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA

JOINT MOTION TO ADVANCE

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KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM
COBB KING AND SIMON ELBERT BOOZER, AND THE
UNITED STATES OF AMERICA, INTERVENER

No. 603

JOHN C. CURRY, INDIVIDUALLY AND AS COMMIS-
SIONER OF REVENUE OF THE STATE OF ALABAMA,
PETITIONER

v.

UNITED STATES OF AMERICA AND DUNN CONSTRUCT-
TION COMPANY, INC., AND JOHN S. HODGSON AND
COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA

JOINT MOTION TO ADVANCE

If the petitions for writs of certiorari be granted in these cases, the parties move to advance their argument, so that, if consistent with the convenience of this Court, they may be heard during the week commencing October 20, 1941.

As indicated in the memorandum filed by the respondents in the present case, the questions here

presented are of large practical importance to the conduct of the defense program undertaken by the United States. State sales and use taxes with respect to the Government's cost-plus-a-fixed-fee contractors may aggregate \$100,000,000 a year. The Comptroller General will not allow payment of such taxes and the taxing authorities of a number of states have insisted that they are collectible and have threatened summary collection if not paid. The question arises in every state of the union. Litigation is pending, before courts or administrative officials, in five other states and two territories; the matter is in the course of negotiation and active controversy in seventeen additional states and one city; proceedings looking toward collection of taxes have been postponed, pending a decision of this Court, in a number of these states and territories. The existing complications and uncertainties, both in the Government's defense program and the fiscal policies of the states, suggest the desirability of a prompt decision.

Wherefore, it is respectfully submitted that the argument of these cases should be advanced to the week commencing October 20, 1941.

CHARLES FAHY,
Acting Solicitor General.

THOMAS S. LAWSON,
Attorney General of Alabama.

FRED L. BLACKMON,
Attorney for King & Boozer.

SEPTEMBER 1941.

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SEP 11 1941

**CHARLES ELMORE MOBLEY
CLERK**

No. **602**

**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

STATE OF ALABAMA, Petitioner

vs.

**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA.**

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**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

No. _____

STATE OF ALABAMA, Petitioner

vs.

**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA.**

The State of Alabama prays that a writ of certiorari issue to review the decree of the Supreme Court of Alabama rendered in the above case on July 29, 1941 (R. folio 147), reversing and rendering the decree of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 133).

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 133), is not reported.

The opinion of the Supreme Court of Alabama (R. folio 149-164) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 572.

JURISDICTIONAL STATEMENT

The final decree of the Supreme Court of Alabama sought to be reviewed was entered on July 29, 1941 (R. folio 147). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

The issue in this case is whether the respondent, King and Boozer, is taxable under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16) with respect to retail sales of tangible personal property made to a contractor purchasing the same under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States. The sustaining of the claim for such immunity by the Court below plainly presents a Federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank v. Priddy*, 295 U. S. 229; *Pittman v. Home Owners' Corp.*, 308 U. S. 21; *The Federal Land Bank of St. Paul v. Bismarck Lumber Company*, No. 1035, October Term 1940.

The Federal questions were specially set up and claimed by the respondent, King and Boozer, in its

protest to the assessment involved (R. folio 4); in its petition or bill filed in the trial Court (R. folio 33); by the United States in its petition of intervention (R. folio 21, 23); in the assignments of error by respondents as appellants in the Court below (R. folio 141); and were briefed and argued before the Court below. The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Sales Tax Act with respect to sales of tangible personal property to contractors purchasing the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as a part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), and of the statute under which the appeal was taken from the assessment (General Acts of Alabama, Extra Session, 1936, page 172), and of the Acts of Congress (Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508), are printed in the Appendix, *infra*.

STATEMENT

This petition is filed to review a decree of the Supreme Court of Alabama rendered on July 29, 1941, (R. folio 147) in which it held invalid an assessment of sales taxes made by the State of Alabama under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, page 16) against the respondent, King and Boozer, a lumber dealer at Anniston, Alabama, with respect to lumber sold by said respondent to Dunn Construction Company, Inc., and John S. Hodgson and Company, contractors, purchasing such lumber under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States for use in the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama. In the majority opinion of the Court it was held that the sales involved were immune from State taxation under the Constitution of the United States; that the contractors were instrumentalities of the United States; and that the United States had not consented to the tax or to the payment thereof by the contractors as a part of the cost of the construction. (R. folio 149-163). A dissenting opinion was rendered by one of the Justices. (R. folio 164).

The contract was executed on September 9, 1940, under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508. (R. folio 54).

The sales involved were made by respondent, King and Boozer, to the contractors, who purchased in their own names and upon their own credit. (R. folio 48 and 81). After delivery of the goods to the contractors and the payment therefor by the contractors with their own funds (R. folio 49), they received reimbursement therefor from the United States. (R. folio 50). The invoice rendered the contractors did not include the sales taxes; however, the seller later rendered the contractors a statement for the tax, but which was not paid. (R. folio 51).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * * * " at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. folio 55); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 56).

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS (\$3,204,588.00)," as stated in Article I (R. folio 55).

Article II of the contract, among other things, provides as follows:

"Cost of the work.

"REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of

machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. folio 58)

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. folio 59)

Other expenditures itemized in Article II are not involved in this case.

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall

not operate to relieve the Contractor from any duties imposed under the terms of this contract.”
(R. folio 56)

Article V of the contract under the head of “Special Requirements” contains, among other provisions, the following:

“1. The contractor hereby agrees that he will:”

“(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.”

“(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of \$500 shall be made or placed without prior approval of the Contracting Officer.” (R. folio 64)

The purchase orders, as shown by copy of a typical purchase order (R. folio 81, 82), after having been approved by the Constructing Quartermaster, were given by the contractors to the respondent, King and Boozer. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTION QUARTERMASTER

At: For McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. folio 81)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the UNITED STATES GOVERNMENT.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. folio 81)

The following, among other instructions, were endorsed on each purchase order:

"2. IMMEDIATELY upon shipment mail to DUNN CONSTRUCTION CO., INC., and JOHN S. HODGSON & CO., at Fort McClellan, Ala.:

"A. ORIGINAL and TWO (2) copies of Bill of Lading, (or shipping papers.

"BILLS OF LADING, etc., MUST READ
UNITED STATES CONSTRUCTION QUARTER-
MASTER AT FORT McCLELLAN, ALA.

Account of DUNN CONSTRUCTION CO., INC.,
and JOHN S. HODGSON & COMPANY
and must also bear PURCHASE ORDER
NUMBER

"B. Six (6) copies of invoice, properly filled
and certified as follows:

"I certify that the above bill is correct and just;
that payment therefor has not been received;
and that except as noted below or otherwise in-
dicated herein all unmanufactured articles,
materials, or supplies furnished under this in-
voice have been mined or produced in the Unit-
ed States substantially all from articles, ma-
terials, or supplies mined, produced, or manu-
factured, as the case may be, in the United
States; and that State or local sales taxes are
not included in the amount billed." (R. folio 82)

The record showed that in placing orders for ma-
terials, shipping and making delivery thereof, and
in obtaining reimbursement therefor, the contractors
were required to comply with various detailed rules,

regulations or instructions of the United States or the Contracting Officer or his agent, the Constructing Quartermaster, but, for the purposes of this petition, it is not deemed necessary to set forth in more detail the facts relating to such circumstances and incidents. (R. folio 90-125)

Under the provisions of the Alabama Sales Tax Act, the assessment was made against the respondent, King and Boozer, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of \$1,372.75 (R. folio 13, 14), being an amount equal to two per cent (2%) of the gross proceeds of the sales (Section II of said Act); the amount of which tax the seller was required to add to the sales price and collect from the purchaser (Section XXVI), and a violation of the provisions of Section XXVI is made a misdemeanor (Section XXVII). The respondent, King and Boozer, executed a bond for the tax, and duly perfected an appeal from the assessment to the Circuit Court of Montgomery County, Alabama, in Equity. (R. folio 7, 8)

The United States of America intervened in said cause for the purpose of attacking the validity of said assessment and the statute under which such assessment was made. (R. folio 21, 23)

The trial Court upheld the validity of the assessment, (R. folio 133-135) from which an appeal was taken by the respondent and the intervener to the Supreme Court of Alabama. (R. folio 135)

In the trial of said cause in the Circuit Court and on appeal in the Supreme Court of Alabama, the respondent, King and Boozer, and the intervener, the United States of America, contended that the purchases made by said contractors constituted purchases "made by or on behalf of the United States or by an instrumentality or agency of the United States," and were, therefore, constitutionally immune from State taxation, and that the United States had not consented to the imposition of such tax.

The State of Alabama contended that the tax as imposed upon the respondent, King and Boozer, and which was required by said Act to be passed on by the seller to the purchaser, was valid; that said Sales Tax Act was valid; that as said sales were made by the respondent to said contractors (a private corporation and a partnership composed of individuals, both engaged in business for private profit), acting in their own names, upon their own credit, and payment for which was made with their own funds, before any reimbursement therefor from the United States under said contract, the same constituted taxable transactions and were not immune from such a nondiscriminatory State tax; that such purchases were not made by an instrumentality or agency of the United States entitled to assert Federal immunity from State taxation; and that the United States waived any immunity from such tax or with respect to the burden thereof in this: that by the terms of said contract, the contractors were required to pay all applicable sales taxes which might be incurred by them in the purchase of materials,

the payment of which taxes constituted a reimbursable expenditure under said contract.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting, reversing the decree of the trial Court and rendering a decree in favor of the respondents and against the petitioner. (R. folio 149-165)

This case was presented to the Supreme Court of Alabama as a companion case to the case of *United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company, Appellants vs. John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee*, 3 So. (2d) 582, involving the validity of an assessment of use taxes made under the provisions of the Alabama Use Act (General Acts of Alabama, Regular Session, 1939, page 96), and in which case the Supreme Court of Alabama rendered a decision on July 29, 1941, reversing and rendering the decree of the trial Court, upon the authority of the ruling in the case at bar, and in which companion case a like petition for writ of certiorari is being filed with this Court.

REASONS FOR GRANTING THE WRIT

The writ should be granted for the following separate and several reasons:

1. The decision of the Court below that sales of tangible personal property to contractors purchasing

the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States are immune under the Constitution of the United States from such a nondiscriminatory sales tax imposed by the State, for the reason that the State is prohibited from imposing "any tax upon the transactions by which the United States secures the things desired for its governmental purposes," was based upon the cases of *Pannhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U. S. 218, and *Graves v. Texas Co.*, 298 U. S. 393. These cases have been distinguished and expressly limited to a tax upon direct sales to the United States or an instrumentality thereof. *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383; *Wheeler Lumber Bridge and Supply Co. v. United States*, 281 U. S. 572; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Tax Commission*, 302 U. S. 186; *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466. The Court clearly erred in applying the holding of the *Panhandle* and *Graves* cases to sales to a contractor.

2. The power of the State to impose a nondiscriminatory sales tax upon a contractor purchasing materials pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is not dependent upon consent of Congress. However, such form of contract, and particularly the tax provision therein (Article II (m)), was considered by Congress on June 4, 1940 (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539), when it rejected proposals to change such provision or the status of the contractors in purchasing materials under such contract; and,

thereafter, in the Act of July 2, 1940 (Public No. 703), under which the construction at Fort McClellan, Alabama, was authorized, Congress expressly authorized the Secretary of War to use "the cost-plus-a-fixed-fee form of contract" (Section 1, Public, No. 703, Appendix, *infra*). Notwithstanding such express approval of the form of contract and the delegation of authority to the Secretary of War to execute the same, as we read the decision, the Court held there was no congressional consent to the imposition of the tax, or the payment thereof as a part of the "Cost of the Work" (Article II (m)); and that if the provision in Article II (m) of the contract was intended as a waiver of any tax immunity, the officer executing the contract (the Secretary of War) lacked the power or authority to do so; and, as interpreted by the Court, the provision was rendered meaningless. This was clearly erroneous.

3. Although the Court failed to designate the status of the contractors, it, in effect, construed them to be instrumentalities of the United States, entitled to constitutional immunity from State taxation. As the contractors were operating for private profit, the decision on this point was clearly erroneous. *Baltimore Ship Bldg. & Dry Dock v. Baltimore*, 195 U. S. 375; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514;; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Standard Oil Company v. Lee*, 199 So. 325; *Federal Compress Co. v. McLean*, 291 U. S. 17; *Kreipke v. Commissioner of Internal Revenue*, 32 Fed. (2d) 594; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Brooklyn Ash Removal Co., Inc. v.*

United States, 80 Ct. Cls. 770, cer. den. 295 U. S. 752; *Helvering v. Claiborne-Annapolis Ferry Co.*, 93 Fed. (2d) 875.

4. The decision of the Court below is directly in conflict with the decision of the Supreme Court of Florida, the highest Court of such State, in the case of *Sandard Oil Company v. Lee*, 199 So. 325, where the same form of contract and the same Federal questions were involved. Such conflict has been held to constitute a ground for granting a writ of certiorari. *Pagel v. MacLean*, 283 U. S. 266; *Singleton v. Cheek*, 284 U. S. 493; *Spicer v. Smith*, 288 U. S. 430; *Trotter v. State of Tennessee*, 290 U. S. 354; *Pagel v. Pagel*, 291 U. S. 473; *Connell v. Walker*, 291 U. S. 1; *Gilvary v. Cuyahoga Valley Ry. Co.* 292 U. S. 57.

5. The decision of the Court below involves the construction of a form of contract expressly authorized by Congress for general use in connection with the National Defense Program involving the expenditures of billions of dollars. A decision of this Court is necessary to settle conflicting interpretations by the Courts and administrative authorities of such form of contract, to determine the Constitutional questions involved as affecting the taxing power of the States, the immunity of the Federal Government, and the doctrine of intergovernmental tax immunity.

CONCLUSION

The decision sought to be reviewed involves questions of vital concern to the Federal Government and the several States. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

✓ **THOMAS S. LAWSON,**
Attorney General of Alabama

✓ **JOHN W. LAPSLEY,**
Assistant Attorney General

✓ **J. EDWARD THORNTON,**
Assistant Attorney General

GARDNER F. GOODWYN, JR.,
of Counsel.

APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 18:

Section 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning: (a). The term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b). The term "department" means the Department of Revenue of the State of Alabama. (c). The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d). The term "tax year" or "taxable year" means the calendar year. (e). The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. (f). The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property (and including the proceeds from the sale of any property handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account

of losses; provided that cash discounts allowed and taken on sales shall not be included, and "gross proceeds of sales" shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit. (g). The word "taxpayer" means any person liable for taxes hereunder. (h). The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in, (not including, however, interest, discounts, rentals of real estate or royalties) and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever and without any deductions on account of losses. (i). The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (j). The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesales. The quantities of goods sold or prices at which sold, are immaterial in determining whether

or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (k). The word "business", as used in this Act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a). Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent (2%) of the gross proceeds of

sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. (b). Upon every person, firm or corporation engaged, or continuing within this State, in the business of conducting, or operating, places of amusement and/or entertainment, billiard and pool rooms, bowling alleys, amusement devices, musical devices, theaters, opera houses, moving picture shows, vaudeville, amusement parks, athletic contests, including wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games, (including athletic contests conducted by or under the auspices of any educational institution within this state, or any athletic association thereof, or other association whether such institution or association be a denominational, a state, a county, or a municipal institution or association or a state, county, or city school, or other institution, association or school), skating rinks, race tracks, golf courses, or any other place at which any exhibition, display, amusement or entertainment is offered to the public or place or places where an admission fee is charged, including public bathing places, public dance halls of every kind and description within the State of Alabama, an amount equal to two per cent (2%) of the gross receipts of any such business. (c). Upon every person, firm or corporation engaged or

continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one-per cent of the gross proceeds of the sale of said automotive vehicle.

Section V. EXEMPTIONS: There are however exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a). The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b). The gross proceeds of sales of tangible personal property to the State of Alabama to the counties within the State, and to incorporated municipalities of the State of Alabama. *****

Section VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department, a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such

person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. Provided, however, that when the total tax for which any person liable under this Act does not exceed ten (10) dollars, for any month, a quarterly return and remittance in lieu of the monthly returns may be made on or before the 20th day of the month next succeeding the end of the quarter for which the tax is due, when specially authorized by the Department of Revenue, and under such rules and regulations as may be prescribed. The Department of Revenue, for good cause, may extend the time for making any return required under the provisions of this act, but the time for filing any such return shall not be extended for a period greater than thirty days from the date such return is due to be made.

Section VII. Any person taxable under this Act, having cash and credit sales, may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collection of such credit sales shall have been made.

Section XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep

the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

Section XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months. Each month of failure to make such reports shall constitute a separate offense, and each refusal of a written demand of the Department to examine, inspect or audit such records shall constitute a separate offense.

Section XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall

immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) per cent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

Section XIV. Any person who fails to pay the tax herein levied within the time required by this Act shall pay, in addition to the tax, a penalty of ten (10%) per cent of the amount of tax due, together with interest thereon at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date at which the tax herein levied became due and payable, such penalty and interest to be assessed and collected as a part of the tax.

Section XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten

(10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one ($1\frac{1}{2}$ of 1%) per cent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a wilful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) per cent of the tax. Provided that upon appeal such action shall be reviewable.

Section XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgement of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. If upon such hearing the Department finds the amount due to be different from that originally assessed, it shall make the assessment final in the correct amount and in all cases shall notify the taxpayer of the assessment as finally fixed. Provided a notice by United States mail addressed to the taxpayer's last known place of business shall be sufficient. Any assessment made by the Department shall prima facie be correct upon appeal.

Section XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made, he may appeal in all respects in the same manner provided by Act. No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final. Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

Section XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of

this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty (\$50.00) Dollars nor more than One Hundred (\$100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

Section XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this act.

Section XXIX. The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided.

Section XXXI. The administration of this act is vested in and shall be exercised by the State Department of Revenue except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be

under the jurisdiction and supervision of the Department, and the Department may require the assistance of, and act through the prosecuting attorney, or deputy solicitor of any county, or any circuit solicitor, and the Attorney General of the State, and and legal counsel of the State Department of Revenue. The Department shall appoint as needed such agents, clerks, and stenographers as may be necessary to enforce provisions of this act who shall serve at the will of the Commissioner of the Department, and who shall perform such duties as may be required, and such duly appointed and qualified agents are authorized to act for the Department as it may direct and as is authorized by law. Each such agent shall execute a bond in the sum of five thousand (\$5,000.00) dollars for the faithful performance of his duties.

Section XXXII. The Department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

Section XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no discount shall be authorized or allowed upon any taxes which are not paid before delinquency as in this Act provided.

Section XXXIX. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this Act shall be held to be unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this Act. It is hereby declared to be the legislative intent that this Act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section, or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

General and Local Acts of Alabama, Extra Session 1936, Act No. 154:

SEC. 1. That Section 103, Article 4 of an act entitled "To provide for the general revenue of the State of Alabama," approved July 10, 1935, be and the same is hereby amended to read as follows: Section 103. Either the State or the taxpayer may appeal from any final assessment made by the State Tax Commission* under any assessment required by law to be made by the State Tax

*The name of the State Tax Commission was changed to "State Department of Revenue" by Act No. 4, approved February 1, 1939 (General Acts of Alabama, Regular Session and Special Session, 1939, pp 1 and 2).

Commission. If the appeal is by the State such appeal shall be made by the Attorney General filing the written notice with the Secretary of the State Tax Commission, and with the Register of the Circuit of Montgomery County in Equity, within thirty days after such assessment is made final. The State Tax Commission shall immediately give notice by registered mail to the taxpayer of the filing of such appeal by the State. If any taxpayer against whom an assessment is made by the State Tax Commission under any assessment required by law to be made by the State Tax Commission, is dissatisfied with the final assessment as fixed by the said State Tax Commission, he may appeal from said final assessment to the Circuit Court of Montgomery County sitting in Equity, or, in cases other than public utilities, to the Circuit Court of the County in which the taxpayer resides if the taxpayer has within the State a permanent residence, at the option of the taxpayer, by filing notice of appeal with the Secretary of the State Tax Commission and with the Register of the Circuit Court of the county to which the appeal shall be taken within thirty days from the date of said final assessment made and entered on the minutes of the Commission as required by law, and in addition thereto by giving bond conditioned to pay all costs to be filed with and approved by the Register of the Court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the

same shall become delinquent and if such taxes are not paid before the same become delinquent, the Court shall upon motion ex mero motu dismiss such appeal, unless at the time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the Register of the Court to which the appeal shall be taken in double the amount of the taxes payable to the State of Alabama, conditioned to pay all taxes, interest, and costs due the State, County, or any Agency or Sub-division thereof. In such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the State Tax Commission shall prima facie be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The Circuit Court in Equity, or the Supreme Court of Alabama on appeal to it may, if it be of the opinion from all the evidence that the assessment is made is either too high or too low, fix the amount of such assessment. The Court shall hear such appeals according to its own rules and methods of procedure so far as practicable and shall decide all questions both as to the legality of the assessment and the amount thereof. * * *

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may

deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

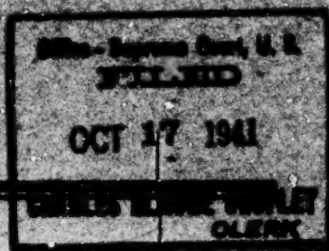
**Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * **

MILITARY POSTS

** * * * * emergency construction, \$47,-
976,962, including the acquisition of neces-
sary land therefor, without regard to the pro-
visions of sections 355 and 1136, Revised
Statutes, as amended (10 U. S. C. 1339; 40
U. S. C. 255); * * * * **

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**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner

vs.

**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA**

BRIEF FOR PETITIONER



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**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner

vs.

**KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and UNITED
STATES OF AMERICA.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA**

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, In Equity (R. 132-134), is not reported.

The opinion of the Supreme Court of Alabama (R. 140-155) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 572.

JURISDICTIONAL STATEMENT

The decree of the Supreme Court of Alabama was entered on July 29, 1941 (R. 139-140). The petition for writ of certiorari was filed on September 11, 1941 (R. 158), and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Sales Tax Act with respect to sales of tangible personal property to contractors purchasing the same pursuant to a "Cost-Plus-A-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as a part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), and of the statute under which

the appeal was taken from the Assessment (General Acts of Alabama, Extra Session, 1936, page 172), and of the Acts of Congress (Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess. c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508), are printed in the Appendix, *infra*, pp. 97-99.

STATEMENT

Under the provisions of the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16), the State of Alabama made an assessment against the respondent, King and Boozer, in the amount of \$1,372.75 for sales taxes due by such respondent, covering the period beginning January 1, 1941, and ending March 31, 1941 (R. 9-10), being two per cent (2%) of the gross proceeds of retail sales of tangible personal property made by respondent within the State during such period (Section 2 of said Act). The respondent, King and Boozer, was a lumber dealer at Anniston, Alabama (R. 42). All of the sales involved in said assessment consisted of sales of lumber made by said respondent to Dunn Construction Company, Inc., and John S. Hodgson and Company, who purchased such lumber in their own names and upon their own credit, under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States executed September 9, 1940, for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama (R. 42-47, 77-81).

Such contract was executed under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508, the pertinent provisions of which Acts are shown in the Appendix, *infra*, pp. 97-99.

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * * " at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. 49-50); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five

Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. 50).

The total estimated cost of the construction, exclusive of the contractor's fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS (\$3,204,588.00)" as stated in Article I (R. 50).

Article II of the contract, among other things, provides as follows:

"Article II—Cost of the work.

REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1. The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be classed as

tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. 52) * * * * *

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. 54)

Othen expenditures itemized in Article II are not involved in this case.

Paragraph 3 of Article I of the contract contained the following provisions with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under

article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. 51)

Article V of the contract under the head of "*Special Requirements*" contains, among other provisions, the following:

"1. The contractor hereby agrees that he will:"

"(b). Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c). Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in

excess of \$500 shall be made or placed without prior approval of the Contracting Officer." (R. 59-60)

Prior to January 1, 1941, a proposal in writing was submitted by King and Boozer to Dunn Construction Company, Inc., and John S. Hodgson and Company (hereinafter called the contractors), to sell large quantities of prefabricated lumber at a stipulated price for use by such contractors in the performance of their contract with the United States. This proposal was submitted by the contractor to the Constructing Quartermaster at Fort McClellan for his approval, and was approved by him.

On the trial of this case, it was stipulated and agreed that all of the sales by King and Boozer of tangible personal property which are involved herein were made by it in connection with the performance by the contractor of its contract of September 9, 1940, and that the property was sold, paid for, and reimbursement made therefor in the manner stated with respect to a particular purchase made on January 17, 1941 (R. 40-86).

Pursuant to the proposal submitted by King and Boozer on January 16, 1941, the contractors prepared and submitted to the Constructing Quartermaster a request for the purchase of certain lumber described in Exhibit 2 (R. 77) attached to the statement of facts. Thereafter, on January 17, 1941, the contractors submitted to King and Boozer at Annis-

ton, Alabama, an order for the material described in Exhibit 2 attached to the agreed statement of facts. As shown by a copy of the order attached as Exhibit 3 (R. 78-80) to the agreed statement of facts, such order was signed by the purchasing agent of the contractors and directed that the materials described in the order should be shipped to the United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company, f. o. b. Fort McClellan. The order further provided as follows:

"This order is placed for the benefit of, and is assignable to, the UNITED STATES GOVERNMENT.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

"TERMS OF PAYMENT as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice." (R. 79)

The purchase order further provided that bills of lading, etc., must read "United States Construction

Quartermaster at Fort McClellan, Ala. Account of Dunn Construction Co., Inc., and John S. Hodgson & Company."

The purchase order also provided that copies of the invoice should be properly filled out and certified as follows:

"I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States and all manufactured articles, materials, or supplies have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. 79-80)

Upon receipt of the purchase order, King and Boozer loaded the material at its place of business at Anniston, Alabama, upon trucks operated by a contract carrier engaged by the seller to transport the lumber to its destination within Fort McClellan. At the time of loading at Anniston, Alabama, the materials were checked and inspected and two separate reports thereof were made, one as shown by report entitled "RECEIVING AND INSPECTION REPORT", a copy of which is attached to the agreed

statement of facts as Exhibit 4 (R. 80). This report was required to be made by the Constructing Quartermaster and was signed by an employee of the contractors and by an employee of the United States representing the Constructing Quartermaster. The other report, entitled "RECEIVING AND INSPECTION REPORT," a copy of which is attached to the agreed statement of facts as Exhibit 4A (R. 81), was a report made to the contractors and by an employee of the United States representing the Constructing Quartermaster.

On January 18, 1941, King and Boozer delivered to the contractor an original invoice, a copy of which is attached to the agreed statement of facts as Exhibit 5 (R. 81), on account of the purchase of the materials described in the purchase order of January 17, 1941. On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractors of the invoice, as appears from a copy of the original invoice transmittal, attached as Exhibit 6 to the agreed statement of facts (R. 82). On January 29, 1941, the Constructing Quartermaster approved the invoice for payment thereof by the contractors, as shown by Exhibit 7 attached to the agreed statement of facts (R. 83).

Thereafter, but prior to February 3, 1941, Dunn Construction Company, Inc., and John S. Hodgson and Company, the contractors, issued their point

check drawn on the First National Bank of Anniston, Alabama, payable to King and Boozer in full payment of the invoice mentioned above, in the amount of \$68.23, being the amount of \$68.40 less one-fourth of one percent discount, which check, upon presentation, was paid in due course (R. 44-45).

Thereafter, on February 3, 1941, the contractors submitted a voucher, copy of which is attached as Exhibit 8 to the agreed statement of facts (R. 84-86), to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures made by them aggregating \$1,991,62, including the expenditure of \$68.23 made to King and Boozer as stated above. This voucher did not include any amount for Alabama sales taxes no such tax having been paid by the contractors or by King and Boozer upon such sales.

Thereafter, the Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on February 5, 1941, the voucher was paid by the Finance Officer at Fort McClellan to the contractors by United States Government check (R. 45).

In submitting for payment the voucher mentioned above, the contractors attached thereto their request made to the Constructing Quartermaster for approval of the purchase, bearing approval of the Constructing Quartermaster for the purchase, copies of their purchase order to King and Boozer, the

two Receiving and Inspection Reports, and the invoice of King and Boozer (R. 77-83).

It was further stipulated that Fort McClellan is located upon and constitutes an area in Calhoun County in the State of Alabama, acquired by the United States of America in 1918 by purchase from the individual owners of such lands; that since such acquisition thereof the United States has continuously used the area as a military reservation or fort; and that all of the buildings and improvements mentioned in the contract of September 9, 1940, were constructed upon such area known as Fort McClellan (R. 46-47).

It was stipulated and agreed that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer in all matters pertaining to the contract of September 9, 1940, between the United States and Dunn Constructing Company, Inc., and John S. Hodgson and Company (R. 47); and that such contract was in full force and effect during the period covered by the assessment (R. 41).

It was further stipulated that King and Boozer billed Dunn Construction Company, Inc., and John S. Hodgson and Company for the taxes, or for a sum

equal to the amount of the taxes, which had been assessed against King and Boozer and which are involved in the present case, but which bill has not been paid. (R. 47).

In addition to the exhibits attached to the agreed statement of facts, four other exhibits were introduced on behalf of Respondents. These exhibits were numbered one to four, inclusive, and are as follows:

Exhibit B to Statement of Evidence (R. 115-118) is a letter, designated as fixed-fee letter No. 5, from the office of the Quartermaster General of the War Department at Washington, D. C., to Constructing Quartermasters throughout the country, and deals with the relations between the Constructing Quartermasters and the contractor on a cost-plus-a-fixed-fee contract.

Exhibit C to Statement of Evidence (R. 118-122) is a letter dated February 19, 1941, designated as Construction Division Letter No. 101, from the office of the Quartermaster General of the War Department at Washington, D. C., to all zone Constructing Quartermasters, to all local Constructing Quartermasters, to all architect-engineers, and to all construction contractors dealing with the responsibility of local Constructing Quartermasters and their relationship with architect-engineers and construction contractors on projects.

Exhibit A to Statement of Evidence (R. 97-115) is designated as "SUPPLEMENT TO GUIDE FOR CONSTRUCTING QUARTERMASTERS REVISED 1940 COVERING FIXED FEE PROJECTS," and was issued by the office of the Quartermaster General on August 27, 1940. The matter contained in this supplement was stated to be intended as general information only to aid the Constructing Quartermasters and their assistants in connection with fixed-fee contracts covering construction work.

Exhibit D to Statement of Evidence (R. 122-127) is a stenographic report of a conference held in Washington, D. C., on September 6, 1940, with Mr. W. R. J. Dunn, of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of John S. Hodgson and Company, of Birmingham, Alabama, representing the contractors, and Lieutenant-Colonel E. G. Thomas, Mr. H. W. Loving, and Mr. F. J. O'Brien, representing the Government, relating to the construction of Camp McClellan, Alabama.

On May 16, 1941, the respondent, King and Boozer, after having duly protested the making of said assessment executed a bond for the tax and duly perfected an appeal to the Circuit of Montgomery County, Alabama, in Equity, pursuant to Act. No. 154 of the General and Local Acts of Alabama, Extra Session, 1936, page 172 (R. 135).

The United States of America intervened in said cause for the purpose of attacking the validity of said assessment and the statute under which such assessment was made (R. 13-27).

The petition filed by King and Boozer alleged that the assessment of May 15, 1941, was based upon the sales price of tangible personal property consisting of lumber purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company as a agent and instrumentality of the United States, and in connection with the performance by the partnership of a contract with the United States, copy of which was attached as Exhibit A to the petition. It was further alleged that these sales were consummated at Camp McGlellan, Anniston, Alabama, an area within the exclusive jurisdiction of the United States. The petition prayed that the assessment be held illegal, null and void on the grounds that the sales were immune under the Constitution of the United States from taxation by the State, that the taxing act of the State exempted the sales from tax, and that the State lacked territorial jurisdiction to impose the tax (R. 27-39).

The State of Alabama filed a demurrer to said petition; and also filed an answer thereto alleging that the assessment was valid for the reason that the sales involved in the assessment were not made to

the United States or to an agency or instrumentality of the United States but were made to Dunn Construction Company, Inc., and John S. Hodgson and Company, who were independent contractors and who were not such an agency or instrumentality of the United States as entitled them to immunity from such tax, that the United States in the contract with the contractors consented to the tax and waived an immunity with respect thereto; that the sales were not consummated within the area of Camp McClellan, and that, even if they were consummated within such area, the United States had released or waived exclusive jurisdiction over such area insofar as the sales and the tax thereon were concerned (R. 31-40).

On May 29, 1941, the United States filed in the Circuit Court of Montgomery County, Alabama, a petition for leave to intervene in the statutory appeal of King and Boozer, on the ground that it was a real party in interest (R. 13-15). On that day the Circuit Court entered an order permitting the intervention of the United States (R. 19). The petition of the United States for leave to intervene was refilled by it as its petition for intervention (R.15).

The petition of intervener set forth the contention that the purchases made by said contractors constituted purchases made by or on behalf of the United States or by an instrumentality or agency of the United States, and were, therefore, constitutionally immune from State taxation, and that the United States had not consented to the imposition of such tax (R. 13-15).

The State of Alabama demurred to such petition and also filed an answer thereto asserting the validity of the assessment and the Act under which the same was made; and alleging that as said sales were made by the respondent to said contractors (a private corporation and a partnership composed of individuals, both engaged in business for private profit), acting in their own names, upon their own credit, and payment for which was made with their own funds, before any reimbursement therefor from the United States under said contract; that the same constituted taxable transactions and were not immune from such a nondiscriminatory State tax; that such purchases were not made by an instrumentality or agency of the United States entitled to assert Federal immunity from State taxation; and that the United States waived any immunity from such tax or with respect to the burden thereof in this: that by the terms of said contract, the contractors were required to pay all applicable sales taxes which might be incurred by them in the purchase of materials, the payment of which taxes constituted a reimbursable expenditure under said contract (R. 19-27).

The trial Court upheld the validity of the assessment (R. 132-134), from which an appeal was taken by the respondent and the intervener to the Supreme Court of Alabama (R. 134-135).

The respondents on appeal assigned various grounds of error, raising the same constitutional

questions set forth in their respective petitions in the trial Court (R. 135-138).

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting, reversing the decree of the trial Court and rendering a decree in favor of the respondents and against the petitioner (R. 140-155).

This case was presented to the Supreme Court of Alabama as a companion to the case of *United States of America, et al, Appellants, vs. John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee*, 3 So. (2d) 582, involving the validity of an assessment of use taxes made under the provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session. 1939, page 96), and in which case the Supreme Court of Alabama rendered a decree on July 29, 1941, reversing and rendering the decree of the trial Court, upon the authority of the ruling in the case at bar, and in which companion case a petition for writ of certiorari was granted by this Court on October, 1941. (Case No. 603).

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In holding that the assessment made against the respondent, King and Boozer, under the provisions of the Alabama Sales Tax Act, was repugnant to the Constitution of the United States.

2. In holding that the sales of tangible personal property made by the respondent, King and Boozer, to the contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, who purchased the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States were constitutionally immune from the Alabama Sales Tax.

3. In holding that such contractors were not independent contractors, but were instrumentalities or agents of the United States, in purchasing the tangible personal property involved in said assessment.

4. In holding that the United States had not authorized or consented to the payment of said tax by such contractors as a part of the cost of the construction.

5. In rendering its final decree of July 29, 1941, reversing the decree of the Circuit Court of Montgomery County, Alabama, in Equity, and in rendering a decree in favor of respondents against petitioner.

SUMMARY OF ARGUMENT

I.

SALES OF TANGIBLE PERSONAL PROPERTY TO CONTRACTORS PURCHASING THE SAME UNDER A COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES ARE SUBJECT TO NONDISCRIMINATORY STATE SALES TAXES:

A. THE NATURE OF THE TAX INVOLVED.

The Alabama Sales Tax Act (Section II) Appendix, *infra*, pp. 86, 87) imposed a privilege or license

tax upon the person engaged in the business of selling tangible personal property at retail within the State of Alabama, in an amount equal to two per cent (2%) of the gross proceeds of such sales, with provisions requiring the seller to add to the sales price and collect from the purchaser the amount due on account of said tax, and prohibiting the seller from refunding the amount so collected, or from absorbing or advertising that he will absorb or refund said tax or any portion thereof (Section XXVI) (Appendix, *infra*, p. 94). A violation of such provisions for passing on or collecting the amount of such tax from the purchaser is made a misdemeanor (Section XXVII) (Appendix, *infra*, pp. 94, 95).

In Section I (j) of the Act (Appendix, *infra*, pp. 85, 86), sales of building materials to contractors for construction purposes are expressly defined as retail sales.

Lone Star Cement Corp. v. State Tax Com., 234 Ala. ~~458~~. 465.

Wood Preserving Corp. v. State Tax Com., 179 So. 254 (1938)

In Section V (Appendix, *infra*, p. 88), sales which the State is prohibited from taxing under the Constitution of the United States, and sales to the State, counties, and municipalities are expressly exempted.

In construing Section XXVI (Appendix, *infra*, p. 94), the Supreme Court of Alabama, in its

opinion in the case at bar held: "The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax." (R. 149).

The tax here involved was assessed against the seller, the Respondent, who was required to pass the tax on and collect it from the vendee, the contractors, as the consumers.

B. THE SALES WERE MADE TO THE CONTRACTORS.

The contract imposed upon the contractors the obligation to furnish the necessary materials (R. 49-50); and pursuant thereto the materials were purchased by the contractors from the respondent, King and Boozer, lumber dealers of Anniston, Alabama, upon orders placed by the contractors in their own names; and the materials were thus sold and delivered to the contractors. The sales were made upon the sole credit of the contractors, and payment therefor was made by the contractors to the respondent, King and Boozer, the vendor, before any reimbursement for such expenditure was received by the contractors from the Government (R. 42-47, 76).

Article V 1 (c) of the Contract (R. 60) contained provisions expressly requiring the contractors to purchase materials in their own names, and in so doing prohibited them from binding or purporting to bind the Government. These provisions were complied with, thereby eliminating any other con-

struction of the transactions or the status of the contractors, than that the sales involved in the assessment were made to the contractors, as independent contractors.

Article I 3 of the Contract (R. 51) contained provisions under which materials purchased by the contractors, after delivery, inspection and "acceptance in writing by the Contracting Officer" should vest in the Government, subject to use by the contractors in the performance of the contract. However, no formal "acceptance in writing by the Contracting Officer" was shown to have been executed with reference to such materials.

Such provision did not affect the purchase of the materials by the contractors, but is predicated upon the consummation of such purchase. Such title provision was inserted in the contract primarily for the purpose of eliminating insurance costs, and should be construed in the nature of a security provision, as the vesting of title in the Government afforded protection and security without affecting the contractors' rights to use the material in the discharge of their contractual obligations.

Although the contractors' purchase order stated that it was assignable to the Government, no assignment was shown to have been made with respect to any of the sales involved in the assessment.

C. THE CONTRACTORS IN THE PURCHASE OF MATERIALS WERE INDEPENDENT CONTRACTORS.

The contract imposed upon the contractors an obligation to furnish the necessary materials (Article I of the contract, R. 49-51); and, as required by the contract, such materials were purchased by the contractors in their own names, solely upon their own credit, and paid for with their own funds, before they received any reimbursement therefor from the Government. (R. 42-47, 76).

Although the contract contained various provisions involving supervision, direction, and control of the work by the Government, such provisions are not sufficient to warrant a construction that the contractors in the purchase of materials became agents or instrumentalities of the United States. Cf. *United States v. Driscoll*, 96 U.S. 421 (1877).

Any such construction would be contrary to the express terms of the contract, as well as the terms of the purchase order. (See Article V I. (c) of the Contract R. 60, and the Purchase Order R. 76).

The vendor could not have maintained an action against the United States to recover the purchase price of the materials sold to the contractors, for the reason that the purchases were made by the contractors in their own names and solely upon their own credit. Since there was no privity of contract

between the Government and the vendor, it is obvious that the contractors were acting as independent contractors in purchasing materials.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

The contractors, a private corporation and a partnership, both engaged in business for private profit, are not instrumentalities of the United States, in any technical sense, and therefore, are not entitled to assert governmental immunity from nondiscriminatory State taxation imposed upon them. They are not instrumentalities of the United States, in any technical sense, in purchasing materials for use in the performance of their contract with the United States, as (a) they are not permitted to purchase upon the faith and credit of the United States, or in the name of the United States, or as agents of the United States (Article V 1 (c) of the contract, R. 60), but are obligated to purchase and furnish such materials (Article I 1 of the contract, R. 49) in their own names and upon their own credit; and (b) they do not come within the approved definition of an instrumentality of the United States, in any technical sense. An instrumentality of the Government, in a strict sense, is defined as one "created and controlled" by the sovereign in furtherance of a governmental function. *Metcalf & Eddy v. Mitchell*, ~~279~~ 269 U. S. 514, *supra*.

The principle under which detailed supervision and control over a contractor or his workers may

create between the owner and the employee of the contractor a relationship of master and servant, with a resulting liability in tort for negligence of the owner, does not apply to actions *ex contractu*, or affect contractual liabilities. *United States v. Driscoll*, 96 U. S. 421, *supra*, *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 (1927); *United Painting & Decorating Co. v. Dunn*, 137 Ga. 307, 73 S. E. 493 (1912). Neither detailed supervision of the work nor prior approval of the contractor's purchase orders, or subsequent provisions of the contract relating to the conditional vesting of title in the United States, nor the cumulative effect of these circumstances, are sufficient to change the terms of the contract of purchase or the relationship between the vendor and the contractors as vendees, especially in view of the fact that the contract expressly prevented any construction which would impose a contractual liability upon the United States to pay the vendor, notice of which provision was given to the vendor by endorsement on the purchase order of the statement, "This purchase order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 79).

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

So long as the contractors in purchasing materials were not permitted to act as agents for the United

States, and were, therefore, placing such orders and making such purchases as independent contractors, the form or terms of the contract between the contractors and the United States was of no concern to the vendor, and did not affect the contract of purchase. The vendor under no circumstances would be entitled to sue the United States for the purchase price of materials thus sold to the contractors, for the reason that he would be unable to show that the contractors purchased as agents of the United States. The crucial test in determining whether the contractors were such agents would be whether the United States as the principal incurred a direct liability for the purchase. It is difficult to conceive of a case in which the relationship of principal and agent may be established by construction, where the parties concerned expressly stipulated against the liability inherent in the relationship sought to be established.

The difference between a lump sum construction contract and a cost-plus-a-fixed-fee construction contract, so far as it affects the questions involved in this case, is merely a difference of form, and is not deemed sufficient to change the status of the contractor from an independent contractor into an agent or employee.

Under the lump sum contract, all items are considered in advance and together constitute a lump sum, whereas under the cost-plus-a-fixed-fee contract, the parties in advance stipulate the means for

determining the items from time to time which in the end aggregate a lump sum.

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

Since the sales were made to the contractors as independent contractors, and not as agents of the Government, the Court below was clearly in error in applying the decisions of this Court in the cases of *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U. S. 218, *supra*, and *Graves v. Texas Co.*, 298 U. S. 283, *supra*, to the transactions here involved. The sales in the *Panhandle* and *Graves* cases, *supra*, were made directly to the United States or to admitted instrumentalities thereof. No sales to contractors were involved in such cases.

In the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, this Court expressly distinguished and limited the *Panhandle* and *Graves* cases to the particular facts there involved.

The Court below also erred in attempting to distinguish the case of *Trinity Farms Construction Co. v. Grosjean*, 291 U. S. 466 (1934), from the case at bar. The decision in the *Grosjean* case did not hinge upon the fact that the material, gasoline in that case, was consumed by the contractor in the performance of the contract with the Government.

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

Certainly the contractors, as independent contractors, may not object to the tax on the ground of the rate or the aggregate amount of the tax, and it is of no consequence to the State whether the contractors pay the tax out of their fixed-fee or other funds, or whether the contractors receive reimbursement for the amount of the tax in addition to their fee. The fixed fee was based upon the total estimated cost, including materials, labor and services.

While the tax imposed is at the same rate as in the case of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, the tax there approved by the Court was two per cent (2%) upon the gross proceeds of the entire contract, including both materials and labor, whereas the tax here is only upon the purchase of materials.

Therefore, the Government may not object to the tax by reason of the rate or amount. The amount of the tax is measured by the amount of the sale in each instance. Furthermore, in this case, the Government stipulated for the payment of the tax by the contractors, and for the reimbursement thereof as a part of the cost of construction (Article II of the contract, R. 52-54). Such provision was in the form of the contract authorized by the Act of July 2, 1940 (Appendix, *infra*, p. 97), and is valid and binding upon the Government.

There is no difference in the economic burden of a sales tax included by the merchant in the price of goods and a like tax separately added. Any objection to the Alabama sales tax upon such ground would be based upon form rather than substance, and such is not the controlling rule in the consideration of constitutional questions.

II.

THE UNITED STATES CONSENTED TO THE TAX UPON THE CONTRACTORS.

While the power of the State to impose a nondiscriminatory tax upon independent contractors is not dependent upon the consent of Congress, nevertheless the legislative history of the Act under which the contract was executed (Act of July 2, 1940, Public No. 703, 76th Congress, 3d Session, c. 508, Appendix, *infra*, p. 97), and of other Acts adopted by the same Congress relating to the National Defense Program (Act of June 11, 1940 (H. R. 8438) Public No. 588, 76th Congress, 3d Session, c. 313), clearly shows that it was the intention of Congress to authorize the construction of various projects through independent contractors.

In the consideration of H. R. 8438, on June 8, 1940, after an extended debate in the House, a proposal to authorize such contractors to act as agents of the Government in the purchase of materials so as to avoid the payment of State taxes in connection

therewith was defeated. Thereafter, in the Act of July 2, 1940, Public No. 703, Congress authorized the execution of the "cost-plus-a-fixed-fee form of contract", the form here involved. From such action, it is clear that Congress intended that the contractors should only be authorized to purchase materials in their capacity as independent contractors. Congress was fully aware of the fact that such form of contract contained the provision for the payment of such taxes by the contractors, and for reimbursement therefor as a part of the cost of construction (Article II 1 (m) of the contract, R. 54).

After such congressional action, two new provisions were inserted in the contract (a) forbidding the contractors from purchasing on behalf of the United States (Article V 1 (c), R. 60), and (b) a provision by which the Government reserved the right to purchase the materials direct and thereby avoid the payment of State taxes thereon (Article II 3, R. 56). However, the failure of the Government to exercise such reserved right to purchase the materials directly constituted a waiver of the immunity which its exercise would have afforded.

Therefore, it is clear that Congress consented to the payment of the tax by the contractors, as independent contractors, and authorized the assumption by the Government of the consequential economic burden thereof, as a part of the cost of construction. The Court below was clearly in error in holding to the contrary.

Furthermore, the action of Congress in passing the Lanham Act (Public Law 137, 77th Congress, 1st Session, c. 260) to assist State and local governments in providing additional services and facilities made necessary in connection with the Defense Program, shows that Congress realized the inability of the State and local governments adequately to meet the needs without Federal aid.

III.

THE SALES INVOLVED WERE NOT MADE WITHIN THE MILITARY RESERVATION OF FORT MCCLELLAN, ALABAMA.

The record shows that the materials were inspected and received on behalf of the contractors at the place of business of the vendor, King and Boozer, at Anniston, Alabama, and not upon the Government reservation of Fort McClellan, Alabama (R. 43, 44). Title therefore passed to the contractors before the transportation of the materials to Fort McClellan.

However, by the passage of the Buck Resolution (Act of October 9, 1940. Public No. 819, 76th Congress, 3d Session, c. 787, effective after December 31, 1940), the Alabama Sales Tax Act became effective with respect to such sales even if made within any such Federal Area.

For these reasons, the Court below did not discuss the questions relating to sales upon a Federal reservation.

ARGUMENT**I.**

SALES OF TANGIBLE PERSONAL PROPERTY TO CONTRACTORS PURCHASING THE SAME UNDER A COST-PLUS-A-FIXED FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES ARE SUBJECT TO NONDISCRIMINATORY STATE SALES TAXES.

A. THE NATURE OF TAX INVOLVED.

The Alabama Sales Tax Act (Section II, Appendix, pp. 86, 87) imposes a privilege or license tax upon persons engaged in selling tangible personal property at retail within the State, in an amount equal to two per cent of the gross proceeds of such sales; and Section XXVI of the Act (Appendix p. 94) required the seller to add to the sales price and collect from the purchaser the amount due by the seller on account of the tax, and prohibited the seller from refunding or absorbing the tax or any portion thereof. A violation of such provisions is made a misdemeanor under Section XXVII of the Act (Appendix p. 94).

The Court below, in the majority opinion, held: "The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax." (R. 149)

As this Court has held that in determining the constitutionality of the tax, the particular name or designation thereof by a State court or legislature is not controlling (*Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 508), we do not deem it necessary to further discuss the question as to whether the tax should be denominated a seller's tax or consumer's tax, or as a levy imposed upon both the seller and consumer.

In Section I (j) of the Act (Appendix, *infra*. pp. 85, 86), it is provided:

"(j) The term 'sale at retail' or 'retail sale' shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. *Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. * * **" (Emphasis added)

In the case of *Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. ~~456~~⁴⁵⁸, 217 So. 399 (1937), in construing the same provision which was included in a previous Sales Tax Act (General Acts of Alabama, Extra Session, 1936-37, pp. 125-128), the Supreme Court of Alabama held:

"This subsection clearly discloses a legislative intent to make gross receipts from sales of com-

modities which are consumed by the purchaser or so used as to destroy such commodity as a constituent element of 'tangible personal property,' the resale of which is itself subject to the tax, a basis of computation of the tax."

See also *Wood Preserving Corp. v. State Tax Com.*, 179 So. 254 (1938).

By this provision sales of building materials to contractors, for use in the performance of a construction contract, are defined as retail sales.

By the provisions of Section V (a) (Appendix, *infra*, p. 88) of the Act, proceeds from sales which the State is prohibited from taxing under the Constitution of the United States are exempted from the Act, and in paragraph (b) of said Section (Appendix, *infra*, p. 88), sales to the state, counties and municipalities are likewise exempted.

B. THE SALES WERE MADE TO THE CONTRACTORS.

The contract required the contractors to furnish the materials. Pursuant thereto, the orders were placed by the contractors in their own names, and the materials were delivered to the contractors, who thereafter paid the purchase price with their own funds before receiving reimbursement therefor (R. 47-76).

Neither the approval of the purchase order by the Constructing Quartermaster nor his approval of the invoice prior to the payment thereof by the contractors is of any consequence in determining the fact that the sale was made to the contractors. Under a lump contract, where the specifications for the materials have been previously prepared and agreed upon by the parties, and changes in prices are the sole risk of the Contractor, there is no occasion for approval by the owner of the contractors' various purchase orders for materials.

However, under any cost-plus form of contract, as the owner assumes the risk of the price changes, he usually reserves the right of prior approval of the contractors' purchase orders. It was for this reason that the Government reserved the right of prior approval of the contractors' purchase orders. Such requirement under a cost-plus contract has never been held to justify the construction that the sale was thereby changed to make it a sale to the owner, with the consequent liability which would attach thereto, or that the purchase was effected by the contractor as agent for such owner with the attendant liability of the principal.

The owner was held not liable to a vendor for purchases made by the contractor under a cost-plus contract in the following cases:

Kruse v. Revelson, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 *supra*.

United Painting & Decorating Co. v. Dunn, 137 Ga. 307, 73 S. E. 493 *supra*.

Cf. *United States v. Driscoll*, 96 U. S. 421 (1877)

It is, therefore, obvious that the prior approval of the Constructing Quartermaster was necessarily required, with no intent thereby to make the United States the purchaser. This is further clarified by the provisions in the contract (Article V 1 (c), R. 60) by which the contractor was prohibited from purchasing in the name of the United States, or from binding or obligating the United States for the payment of materials, or from representing that the United States assumed any liability therefor. This provision required the contractor to "make all such contracts in his own name, and not bind or purport to bind the Government or Contracting Officer thereunder."

Although the purchase order stated that it was assignable to the Government, no assignment was shown to have been made with respect to any of the sales involved in the assessment. As no such assignments were made, it needs no argument to show that the sales as consummated were made to the contractors.

The provisions of the contract (Article I, paragraph 3, R. 51) under which, after delivery of the materials and upon inspection "*and acceptance in*

writing by the Contracting Officer," title to materials is to vest in the Government, subject to the contractors' rights and obligations to use the same in the performance of the contract, did not effect the fact that the sale, the incidence of the tax, was to the contractors. Such provision is predicated upon a purchase by the contractors, and has only a subsequent field of operation. This provision was evidently inserted for security purposes, and did not make the transaction a purchase by the United States or for the sole use or benefit of the United States. Furthermore, as this provision was not disclosed to the seller, and was clearly not intended to confer upon the contractors the authority to act as agents, it did not affect the terms of the sale as between the vendor and the purchaser, or the taxable character of the transaction. The record fails to show that any such formal acceptance in writing as contemplated by this provision of the contract was ever executed by the Contracting Officer or by his designated agent, the Constructing Quartermaster.

The agreement between the Government and the contractors that title should contemporaneously or subsequently vest in the Government for security purposes, or to lessen insurance costs, before the material is placed in the structure by the contractors, did not change the fact that the contractors purchased for consumption, and are, therefore, properly construed as the consumer under the Alabama Sales Tax Act. It was nevertheless the ultimate retail sale of the tangible personal property, in fact and in law,

and was so defined by the Act. (Section I (f) Alabama Sales Tax Act Appendix *infra*, p. 84).

Lone Star Cement Corp. v. State Tax Commission, 234 Ala. 465, 175 So. 399, *supra*.

The transactions certainly had their taxable moment. See *So. Pac. v. Gallagher*, 306 U. S. 167 (1938), *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182, 186, 187 (1938), and *Dept. of Treasury of the State of Indiana v. Wood Preserving Corp.*, 85 L. Ed., 817. Also, the transactions constituted taxable incidents under the authority of *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 *supra* and *James v. Dravo Contracting Co.*, 302 U. S. 134 *supra*.

In a pamphlet entitled "Some Commentaries on 'Cost-Plus-a-Fixed-Fee' Contracts with Particular Reference to United States Navy Contracts Under the Bureau of Yards and Docks", by William M. Smith, Special Assistant to the Chief of the Bureau of Yards and Docks, published by the Navy Department on May 20, 1940 (pp. 16, 17), in commenting upon the provisions for the vesting in the Government title to materials, it is said.

"Another item which would also probably have involved a large expenditure was insurance on materials purchased by the contractors for the purposes of the contracts. A special provision was, likewise, recommended and accepted as to this item to

give the Secretary authority to accept materials at any place or places he might deem necessary to minimize insurance costs. The principle of non-insurance of Government property is well established. By taking title to materials at the time possession passed from the seller to the contractors they became Government property at the time and where they happened to be and regardless of whether they had been paid for by the Government."

The title provisions in the form of the contract there under discussion are set forth in the last paragraph of Article 10 of such Contract (page 30 of said pamphlet), and read as follows:

"The Contracting Officer may, in his discretion and on behalf of the Government, take possession at any place he may elect of any material procured by the Contractors for the purpose of transporting it to the site where it is to be used or held for further disposition and may subsequently return such material to the possession of the Contractors for use. Final disposition of any surplus material shall be made as directed by the Contracting Officer. The title to each item of materials, articles, and supplies passes to the Government when acceptance of title is duly authorized or approved by the Contracting Officer."

It is therefore apparent that the purpose of the title provisions was to avoid or minimize insurance costs in certain instances or under special circum-

stances, probably not intended to apply to all material purchased by the contractors and delivered in the ordinary course of the performance of the contract.

As indicated in the above mentioned pamphlet published by the Navy Department, certain administrative officers erroneously conceived the idea that such title provisions would support a construction that the contractors were agents of the Government, that the sale to the contractors should be treated or construed as a direct sale to the United States, and therefore immune from state taxation under the authority of the case of *Panhandle Oil Co. v. Miss. ex-rel. Knox*, 277 U. S. 218, *supra*. However, neither this nor any other provision in the contract warranted a construction that the purchase was made by the Government, or by the contractors as agents.

The title thus attempted to be vested in the Government was not unconditional or absolute, as the contractors retained the beneficial interest in the material which was necessary to enable them to use the materials in the performance of the contract. There were only two incidents necessary to be considered to determine the taxable character of the sales here involved, viz: (1) Were the sales in fact made to the contractors acting in their own names and for themselves? (2) Were sales of building materials to contractors properly defined and classified as retail sales under the Alabama Sales Tax Act. (See Section I (f) of the Alabama Sales Tax Act Appendix *infra*, p. 84).

It is clear that the contractors purchased for consumption or use, and not as dealers for resale. It was within the power of the State to select such sales as a taxable incident, and certainly no taxpayer may evade such a tax by making a collateral agreement with respect to the vesting of the bare legal title for security or other purposes which in no way changed the purpose or character of the purchase. The contractors were not by the title provisions relieved of the obligation to "furnish" the materials for the construction, or to construct the specified improvements upon the land. The contract remained a construction contract, and not a contract for the sale of the materials as tangible personal property.

As the sales involved were unquestionably made to and upon the sole credit of the contractors, the facts are not susceptible of the construction that they constituted purchases by or on behalf of the United States.

C. THE CONTRACTORS IN THE PURCHASE OF MATERIALS WERE INDEPENDENT CONTRACTORS.

Neither any provision of the contract or any incident in its performance, nor the cumulative effect thereof was sufficient to create between the United States and the contractors the relationship of principal and agent in the purchase of materials.

Although the contract provided that the contractors shall be "subject in every detail to his (the Con-

tracting Officer's) supervision, direction and instructions" (Article I, paragraph 1 of the contract, R. 49-50), such detailed control on the part of the United States may not be construed as constituting the contractors as agents of the Government in purchasing materials, especially in view of the specific provisions of the contract which required the contractors to furnish the materials (Article I of the contract, R. 49-51), and to purchase the same in their own names without binding or purporting to bind the United States (Article V, paragraph 1 (c) of the contract, R. 60).

It is clear that such detailed supervision or the right to exercise the same was not intended to be so construed as to override the specific provisions fixing the obligations and capacity of the contractors in purchasing materials. While it is true that when the owner reserves such detailed supervision, direction, and control of the work, or in fact exercises it, an employee of the contractor may be enabled to establish between the owner and himself the relationship of master and servant and thus impose upon the owner a direct liability or responsibility in tort, the principles there involved have no application whatever to the determination of a liability between the vendor and the vendee under a contract of sale. Here the contract was certain. The seller was not mislead. He was advised that he was making a sale to the contractors and to them only. There was no question of an undisclosed principal. The characteristics of the sale were thus

fixed as a transaction or incident subject to the State's power of taxation.

In the following cases, involving the question of liability of the owner for personal injuries resulting from the negligence of the contractor under a cost-plus- contract, the contractor was construed to be an independent contractor:

Ocean Accident & Guarantee Corp. Ltd. v. Kennison, 42 Ariz. 349, 26 Pac. (2d) 113 (1933).

J. B. McCrary Engineering Co., et al v. White Coal Power Co., et al, 35 Fed. (2d) 142 (1929; C. C. A. 4th).

Allen, et al v. Republic Bldg. Co., et al, (Texas Civ. App; 1935) 84 S. W. (2d) 506 (1935).

Crown City Lodge I. O. O. F., No. 395, et al v. Industrial Accident Commission, et al, 10 Cal. App. (2d) 83, 51 Pac. (2d) 143 (1935).

Morgan v. Smith, 159 Mass. 570, 35 N. E. 101 (1893).

Whitney & Son Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242 (1898).

Hale v. Johnson, 80 Ill. 185 (1875).

Underwood Contracting Corp. v. Davies, 287 Fed. 776 (1923; C. C. A. 5th).*

Carleton v. Foundry & Machine Products Co., et al, 199 Mich. 148, 19 A. L. R. 1141, 165 N. W. 816 (1917).

Alexander v. Mandeville, 33 Ill. App. 589 (1889).

Norman v. Middlesex & C. Traction Co., 71 N. J. L. 652, 60 Atl. 936, 18 Am. Neg. Rep. 549 (1905).

Campbell v. Jones, 60 Wash. 265, 20 A.L.R. 671, 110 Pac. 1083 (1910).

Emerson v. Fay, 94 Va. 60, 26 S. E. 386 (1896)

Edmundson v. Coca Cola Co., (Texas Civ. App; 1912) 150S: W. 273.

Bayne v. Everham, 197 Mich. 181, 163 N. W. 1002 (1917)

In the following cases, the owner was held not liable to the vendor for materials purchased by the contractor under a cost-plus contract:

Kruse v. Revelson, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137, *supra*.

United Painting & Decorating Co. v. Dunn, 137 Ga. 307, 73 S. E. 493, *supra*.

In the case of *United States v. Driscoll*, 96 U. S. 421, *supra*, an employee of the contractor attempted to recover wages in a direct action against the United States (*Driscoll v. United States*, 13 C. Cls. 15 (1877)) on the theory that, by virtue of the supervision and control exercised by the United States over the contractor employed under a cost-plus-a-fixed-fee percentage basis, the contractor was the mere agent of the Government in the employment of laborers, and that the United States as a principal became directly liable to such employee. The Court, through Mr. Justice Swayne, held:

"It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him and did pay him. The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen per cent in addition, was the measure of the amount to be paid to Ordway. The fact that Ordway procured the appellee's receipts, presented his own vouchers to the government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for government. *The hands trusted the former; and, if he had failed to pay them, the loss would have been theirs.* The gov-

ernment having the contractor's receipts, it could not have fallen upon the United States. The acknowledgement of payment by the employes, before getting their money, was wholly their own concern. *Ordway was bound by his contract to have the work done as specified; and upon every default he was liable for a penalty of \$100 a day until he should fulfill his undertaking. This stipulation is incongruous with the idea of his being an agent and not a contractor. The latter was his relation to the government. Between himself and the appellee it was simply that of employer and employe.*

"The mode, manner, and rate of Ordway's compensation was a matter between him and the United States, and was one with which the appellee had nothing to do. Hence, in this case, it can in nowise affect the rights of the parties. The appellee stands upon exactly the same ground as the employes of any other contractor with the government. It follows that he can have no rightful claim against the appellant." (Emphasis added).

The contractor under a cost-plus contract was construed to be an independent contractor in the following cases:

Baumann, et al v. City of West Allis, et al, 187 Wis. 506, 204 N. W. 907 (1925) (Case in-

volving statute prohibiting agent of a city from having a financial interest in the contract with the city).

Veitch v. Jenkins, 107 Va. 68, 57, S. E. 574 (1907). (Case involving liability of a contractor's employee to land owner on account of defective workmanship).

In the following cases the fact that the contract was on a cost-plus basis instead of on a lump sum basis was not deemed material in determining the relationship of the contractor, who was held to be an independent contractor:

Casement v. Brown, 148 U. S. 615, 13 S. Ct. 672, 57 L. Ed. 582 (1893).

McKenzie Construction Co., v. United States, 64 C. Cls. 645 (1928).

In the case of *Standard Oil Company v. Lee*, 199 So. 325 (1940) (Florida) involving the same form of cost-plus contract as in the case at bar, the contractors were construed to be independent contractors in the purchase of materials. While it is true that such relationship was there stipulated by the parties, such construction of the contract was approved by the Court. The point was necessarily presented for decision, and is in direct conflict with the holding of the Court below in the case at bar.

By the weight of authority, as illustrated in the above cited cases, the contractors in the purchase of materials under a cost-plus contract would be construed as independent contractors, subject to any incidental tax applicable to the exercise by them of such right or privilege thereunder. However, in the case at bar, it is not necessary to determine this relationship by construction, for the reason that the capacity and relationship of the contractors in purchasing materials is specifically and finally fixed under Article V 1 (c) which reads as follows:

“(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; *make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder.* No purchases in excess of \$500 shall be made or placed without the prior approval of the Contracting Officer.” (*Emphasis added.*) (R. 60).

The record shows that the contract remained in full force and effect during the period involved (R. 41). Also, it is shown that in the procedure followed by the contractors, in placing orders for ma-

terials, they acted in their own names, and there was endorsed upon each purchase order the following statement:

"This order is placed for the benefit of, and is assignable to, the United States Government. This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 78-80).

This specific provision in the contract and the above quoted endorsements placed upon the purchase orders pursuant thereto are conclusive against any contention that the contractors, in purchasing such materials, were acting in the capacity of agents for the United States. The fact that the contractors were not permitted to bind the United States would certainly prevent the vendor from recovering from the United States, as principal, the purchase price for such materials. On the other hand, the principal would be liable if the purchase were shown to have been made by and through an agent, whether the principal in the transaction was disclosed or undisclosed. The crucial test as to whether the relationship of principal and agent existed is whether the purchases by the contractors created any liability from the United States to the vendor of the materials. Since no such liability was created under the express terms of the contract between the contractors and the United States or the contract of purchase between the contractors and the vendors, there is no basis for a finding that the relationship of

principal and agent existed between the United States and the contractors in the purchase of materials. The Court below was clearly in error in holding otherwise.

In considering whether the employees of contractors in the performance of a cost-plus-a-fixed-fee construction contract are subject to the provisions of the Social Security Act (Subsection (a) and (c) of Chapter 9 of the Internal Revenue Code as amended by the Social Security Act Amendments of 1939), the Treasury Department ruled that such employees are employees of an independent contractor, and, therefore, are subject to the provisions of the Social Security Act (Internal Revenue Bulletin No. 11, published March 17, 1941, pp. 5 and 6).

Employees of a contractor in the performance of a cost-plus contract with the United States have been held not to be employees of the Government within the purview of the law and regulations governing hours of labor, leave, and pay of Government employees. (24 Comp. Dec. 671; JAG 242.5, March 26, 1918.) And the Judge Advocate General has held that employees of civilian contractors on a cost-plus-a-fixed-fee basis were not employees of the Government within the purview of the dual pay statutes. (JAG. 248.4, Dec. 5, 1940).

A like status of cost-plus-a-fixed-fee contractors is recognized in a decision by the Comptroller General of the United States (B-18974, August 16,

1941), construing such form of contract on the question of reimbursement of the contractor for uninsured losses resulting from negligence of the contractor or of his employees, and instances in which a Government employee's negligence may have contributed to the loss.

See "Taxation of Government Bondholders and Employees, The Immunity Rule and the Sixteenth Amendment, A Study Made by the Department of Justice, Second Printing," 1939, Chapter III C (2), "The Government Contractor", pages 35, 36, 37 and 38.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

We are not aware of any decision of this Court, or any other authority, which supports the contention that such a private corporation or partnership as the contractors here involved, operating for private profit, should be construed as instrumentalities of the United States, in a technical sense, and, therefore, immune from State taxation.

As expressed by Mr. Justice Douglas in the case of *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358 (1939), "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter."

And as stated by Mr. Justice Holmes in the case of *Baltimore Ship Building & Dry Dock Co. v. Baltimore*, 195 U. S. 375 (1904), " * * * it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person, or its property, because it is employed by the United States * * *." (See *Fidelity and Deposit Co. v Pennsylvania*, 240 U. S. 319 (1916).)

It thus seems to be firmly established that neither a private corporation nor a private partnership or individual operating for gain may be construed to be an instrumentality of the United States, in any technical sense, and, therefore, entitled to the implied constitutional immunity of the Government from State taxation.

Apparently the most accurate definition of an instrumentality of the United States, or an instrumentality of the State, in a strict or technical sense, is that stated by Mr Justice Stone (now Mr. Chief Justice Stone) in the case of *Metcalfe & Eddy v. Mitchell*, 269 U. S., *supra*, where it was held that such an instrumentality must be both "created and controlled" by the sovereign "exclusively to enable it to perform a governmental function".

And an independent contractor was there held to be excluded as such an agency of either sovereign; and this holding was reiterated in *James v. Dravo Contracting Co.*, 302 U. S. 134, 157, 158, *supra*, and appears to be a sound and settled principle of constitutional law.

As illustrated in the case of *Clallam County v. United States*, 263 U. S. 341, (1923) where the Spruce Production Corporation, a corporation organized under the laws of a State, was held to be an instrumentality of the United States entitled to enjoy government tax immunity, it appeared that the corporation was organized and operated exclusively for governmental purposes, in furtherance of the National Defense, and not for private profit, the entire stock being owned by the Government.

In commenting upon the nature of such instrumentality involved in that case, Mr. Justice Holmes, speaking for this Court, said: " * * * here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account."

An instrumentality of the United States in its technical sense—one which is clothed with the immunity of its sovereign—as recognized and defined by this Court, is some legal entity, usually in the form of a corporation or association, created and controlled by the Government in furtherance of a governmental purpose, such as the national banking associations, Reconstruction Finance Corporation, Home Owners Loan Corporation, Federal Land Banks, and many other like corporations or organizations. As in the case of national banks, the con-

trol of the sovereign is not necessarily extended to ownership.

We are not aware of any private corporation, partnership, or individual, or business conducted thereby for gain, which has been recognized by this Court as constituting a governmental instrumentality in its technical sense, either State or Federal.

While this rule does not prevent the sovereign, either Federal or State, from making use of private corporations, partnerships and individuals, or contracting for their service in furtherance of governmental purposes or functions, it is here that the dividing line is drawn under the doctrine of intergovernmental tax immunity; and the private corporation, partnership, or individual operating for private profit is left subject to nondiscriminatory taxation imposed by the other sovereign. The mere fact that the tax results in imposing an indirect economic burden upon the sovereign does not affect its validity. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra*; *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*; *Trinity Farms Construction Co. v. Grosjean*, 291 U. S. 456, *supra*; *Alward v. Johnson*, 282 U. S. 509 (1931); *Graves v. New York, ex rel. O'Keefe*, 306 U. S. 466, (1939); *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

In the case of *United States v. Query, et al*, 37, Fed. Supp. 972, decided April 1, 1941, (affirmed without opinion by the Fourth Circuit Court of Appeals June 27, 1941), the court held that as Army

Post Exchanges and other similiar organizations were created pursuant to various Acts of Congress, were not operated for private profit, and were subject to regulation and control by the Government, they constituted instrumentalities of the United States, immune from State taxation.

In the following cases which involved a construction by the Federal Courts of the doctrine of inter-governmental tax immunity, the contractor with the State was held liable for Federal tax, even though it was admitted that the immunity would have applied if the activity had been performed directly by or in the name of the State:

Metcalf & Eddy v. Mitchell, 269 P. S. 514, *supra*.

Kreipke v. Commissioner of Revenue, 32 Fed. 2d 594, (1929) (Contractor under cost-plus contract with a State.)

Blair, Comm. of Revenue v. Byers, 35 Fed. (2d) 326 (1929).

Helvering v. Clairborne-Annapolis Ferry Co., 93 Fed. (2d) 875 (1938).

Comm. of Internal Revenue v. Modjeski, 75 Fed. (2d) 468, cer. den. 295 U. S. 764.

Brooklyn Ash Removal Co., Inc., v. United States,
80 Cls. 770, 16 Fed. Supp. 152. cert. den.
295 U. S. 752 (1935).

Cf. Helvering v. Gerhardt, 304 U. S. 405, *supra*.

The failure of the Court below, in the case at bar, to give effect to this well defined principle in the doctrine of intergovernmental tax immunity was erroneous; and unless such decision is reversed by this Court the principle of intergovernmental tax immunity will be so extended as to seriously impair the revenue of the other sovereign affected. Furthermore, it is inconceivable that this Court would approve one rule with respect to such contractors employed by the Federal government and a different rule with respect to contractors employed by a state under the same form of contract in furtherance of a governmental function.

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

The mere form of the contract does not affect the right of the State to impose a non-discriminatory tax upon the contractors.

The only argument to sustain any contention that a different rule should be applied in determining the question of tax liability of a contractor under a cost-plus contract from that of a contractor under a lump sum contract, is that, by virtue of the direction and supervision imposed upon the contractor under the

cost-plus contract, the relationship of principal and agent is created. This construction is untenable. It is contrary to the general rules applicable in determining a contractual liability, and, furthermore, it is in direct conflict with the specific provisions of the contract which prohibit the contractor from purchasing materials in the capacity as an agent for the United States, and compel him to buy in his own name, upon his own responsibility (Article V 1 (c) of the Contract, (R. 60) and with his own funds, and to actually pay therefor before submitting a bill for reimbursement for the expenditures incurred in the purchase of materials, plus the State taxes applicable thereto. If the contract were silent in these respects, it might be contended that the relationship of principal and agent arose, and that the Government incurred a direct liability to the vendor; and it was doubtless for such reasons that the express provision to the contrary was inserted in the contract, and the contractor was required to so warn the vendor. These circumstances fixed the relative rights of the parties, and stamped the transactions as incidents clearly subject to State taxation.

If the United States had made the purchase in its own name, or had authorized the contractors to purchase in the name of the United States, as agents therefor, or in the name of the contractors as agents for the United States, the transactions would have been immune from taxation, and would also have been expressly exempt under the terms of the Alabama Sales Tax Act (Section V (a), Appendix *infra*, p. 88).

In the cost-plus-a-fixed-fee form of construction contract, the aggregate amounts paid by way of reimbursement, plus the fixed fee (the contractor's profit upon the entire contract), together constitute a lump corresponding to the lump sum stipulated in contracts referred to as lump construction contracts.

In the one case, the lump sum is known at the time and is, therefore, stipulated, whereas in the other case the factors which will constitute the lump sum are agreed upon and, thereby, the parties have legally agreed upon the separate items of cost or the manner for determining the amount thereof which in the aggregate constitute a lump sum. The reason for the arrangement in this case was to expedite the construction by and through an independent contractor, without awaiting the completion of final plans and specifications (¹), even though it necessitated a greater degree of supervision, direction and control of the work, and required the approval from time to time of each of the contractors' purchase orders.

In the case of *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137, *supra*, the Court held:

(¹) Pamphlet entitled "SOME COMMENTARIES ON 'COST-PLUS-A-FIXED-FEE' CONTRACTS" by William M. Smith, published by Government Printing Office, 1940, p. 2; see statement of Secretary of Navy in "HEARING BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES, SEVENTY-SEVENTH CONGRESS FIRST SESSION ON THE NAVY DEPARTMENT APPROPRIATION BILL FOR 1941", pp. 16, 17.

"We are unable to see any distinction in the relationship created by the cost plus \$800 contract and the relationship that would have been created by a contract wherein the Golden Building Company had agreed to build the building for \$20,800. The fact that the cost of the labor and material was not definitely determined in advance and the amount of the profit was definitely determined in advance does not distinguish the character of the contract from that of a contract where the cost is attempted to be determined in advance, since a definite basis was agreed upon by which the cost was to be ascertained."

In the case of *Carleton v. Foundry and Machine Products Company, et al*, 199 Mich. 148, 19 A. L. R. 1141, 165 N. W. 816, *supra*, in holding that the relationship under a cost-plus contract was that of an independent contractor, the Court said:

"We may take judicial notice that the arrangement of paying cost, plus a percentage as a contract price for a completed job, is growing in favor, and is becoming a common plan adopted by contractors in place of a lump sum payment. The federal Government has let contracts involving the expenditure of enormous sums of money on this plan. The change is only in the method of computing payment. There is no change in the relation of the parties from that which exists where

the payment is a lump sum. The manner of computing payment for the completed job is not controlling; a change in this regard does not convert an independent contractor into an employe, either at common law or within the meaning of the act."

See *Casement v. Brown*, 148 U. S. 615, *supra*.

Cf. *McKenzie Construction Co. v. United States*, 64 C. Cls. 645, *supra*.

Cf. *United States v. Driscoll*, 96 U. S. 421, *supra*.

If such vendor should attempt to institute a direct action against the United States to recover for materials sold to the contractor, it is assumed that the Government would interpose the defense that the purchase was made by the contractor as an independent contractor and not in the capacity as an agent for the United States; and that the vendor was so advised in advance to prevent any misconstruction of the relationship; and it is inconceivable that the Court in such action would shield the United States from liability, but for the purpose of determining questions of State taxation, would uphold the contrary contention that the purchase was made by the contractors as agents for the Government.

This illustrates the point that the contention made by the Government in the case at bar is inconsistent

with the specific provisions of the contract, the form of which was expressly authorized and approved by Congress (Public No. 703, Appendix, *infra*, p. 97).

Likewise, the certificate required by the Government to be endorsed on the contractors' invoice, to the effect that no sales tax is included therein (R. 79-80), was contrary to the letter and spirit of the contract. (Article V 1 (c) of the contract R. 60).

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

We are not here dealing with a case involving an attempt to impose a tax upon the United States or an admitted instrumentality thereof.

It is, therefore, unnecessary to discuss the general rule that the United States and its instrumentalities are constitutionally immune from State taxation.

The Court below was clearly in error in applying the decisions of this Court in the case of *Panhandle Oil Co. v. Miss. ex rel, Knox*, 277 U. S. 218, *supra*, and *Graves v. Texas Co.*, 298 U. S. ³⁹¹~~282~~, *supra*, to the case at bar, for the reason that the sales involved in such cases were made directly to the United States, or to admitted instrumentalities thereof, whereas the sales here involved were shown to have

been made to independent contractors. In the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, the decisions in the *Panhandle* and *Graves* cases were distinguished and expressly limited to the particular facts there involved, namely, direct sales to the United States or its instrumentalities. The holding of the Court below is in conflict with the decisions of this Court in the cases of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra*, *Trinityfarms Const. Co. v. Grosjean*, 291 U. S. 456, *supra*, *Alward v. Johnston*, 282 U. S. 509, *supra*, *Wheeler Lumber Co. v. U. S.*, 281 U. S. 572 (1930); *United States v. Driscoll*, 96 U. S. 421, *supra*; and *Silas Mason Co. v. Tax Com.*, 302 U. S. 186, *supra*, and is also in conflict with the doctrine of intergovernmental tax immunity as defined by this Court in numerous cases. See *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, *supra*, *Helvering v. Gerhardt*, 304 U. S. 405, *supra*.

The Court below attempted to distinguish the case of *Trinityfarms Const. Co. v. Grosjean*, 291 U. S. 456, *supra*, from the facts of the case at bar on the ground that the contractor is subject to the tax in the purchase of his own equipment to be used by him in the construction, and on the supplies purchased by him to be consumed by him in the performance of the contract, but that a different rule should obtain with respect to materials which are to go into the construction and thus will ultimately be acquired by the Government. We do not construe that

such distinction in use was the basis of the decision by this Court in the *Grosjean* case. The basis of the decision of this Court in the *Grosjean* case, as we construe it, was that the incidence of the tax was the sale to an independent contractor, that the tax was nondiscriminatory, and the economic burden upon the Government was indirect and consequential; and that neither the rate nor aggregate amount of the tax was deemed by the Court to constitute such an interference with Government, or to so impair the efficiency of the contractors as to be repugnant to the constitution of the United States. These were the same reasons which formed the basis of the approval of the tax in the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*.

The *Panhandle* and *Graves* cases have been treated or construed by various Courts⁽²⁾ and Departments of Government⁽³⁾ as having been overruled by this Court; although the Comptroller General of the United States, the Navy Department and War Department apparently take a contrary view⁽⁴⁾.

(2) California, *Western Lithograph Co. v. Board of Equalization*, 11 Cal. (2) 156, 78 P. (2) 731 (1938); Florida, *Standard Oil Co. v. Lec*, 142 Fla. 906, 199 So. 325 (1940); North Dakota, *Federal Land Bank v. De Rochford*, 69 N. D. 382, 287 N. W. 522.

(3) Opinion of Attorney General of the United States, August 5, 1939 (Vol. 3, Op. 85) pp. 4-5. Taxation of Government Bondholders and Employees, The Immunity Rule and the Sixteenth Amendment, A Study made by the Department of Justice, Second Printing, p. 62 n. 228 in which such cases were construed to be narrowly limited and probably overruled by *James v. Dravo Contracting Co.*, 302 U. S. 134. Cf. Treasury Department, Internal Revenue Bulletin, No. 11, March 17, 1941, pp. 4 and 5.

(4) Pamphlet entitled "Some Commentaries on 'Cost-Plus-A-Fixed-Fee' Contracts" by William M. Smith, published by Government Printing Office, 1940. p. 17.

Counsel for the Government attempt to distinguish the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, upon the ground that the tax there applied to proceeds which had been disbursed to the contractor, in other words that the incidence of the tax was the receipt by the contractor of proceeds earned in the performance of the contract, whereas, in the case at bar, if the contractors paid the tax, the Government would be called upon to reimburse the contractors for the exact amount of the tax, and, therefore, that the tax should be construed as imposing a direct burden upon the Government; and while admitting that the contractors' fixed fee is subject to a nondiscriminatory State tax thereon, such counsel contend that any such tax should be limited in its measure to the amount of the contractors' fixed fee, and should exclude the amount of his purchases of materials or proceeds received by way of reimbursement for such expenditures. Such contention is directly in conflict with the principle decided in the case of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*.

In the case at bar, the independent contractor is required to make his own purchases with his own funds, a privilege or incidence clearly subject to nondiscriminatory State taxation. It is of no consequence to the State whether the contractor pays such tax out of his fixed fee which, as expressed by the Secretary of the Navy, Mr. Knox, before the Subcommittee of the House Committee on Appropriations, "is based on an estimated cost determined by

negotiation in advance"⁽⁵⁾ or whether, by virtue of the contract, the contractor is entitled to reimbursement therefor in addition to his fixed fee. This Court has in no case so limited or defined the taxing power of the State. The State is not limited to a choice between the imposition of net income taxes and gross receipts or sales taxes. Since each of these taxes has a distinct field of operation, the State may include both as a part of its system of State taxation.

As expressed in the case of *Witherspoon v. Duncan*, 4 Wall. 210, 217 (1867): "It is not the province of this court to interfere with the policy of the revenue laws of the States * * * * ."

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF. .

The validity of the tax is not dependent upon whether the contractor is required to pay the tax out of his fixed fee (which was stipulated on the basis of the total estimated cost of the construction, in-

(5) See Section 4 (a) of Act of April 25, 1939 (Public No. 43, 76th Congress, 53 Stat. 590-592), where it is provided: "Such fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of the Navy. Changes in the amount of the fee shall be made only upon material changes in the scope of the work concerned as determined by the Secretary of the Navy, whose determination shall be conclusive." See also Preliminary Conference with Contractors, Exhibit D (R. 122, 126), where it was stated: "The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs * * * ."

cluding materials and labor), or whether the contractor may legally obtain additional payments to reimburse him for payment of the tax, or whether such reimbursement provisions are valid or invalid. As the contractors in purchasing materials were independent contractors, the power of the State to impose taxes upon them is only limited by the principle that the tax may not be discriminatory, or constitute such an excessive burden as would meet the condemnation of this Court on the ground that it materially interfered with the performance of the contract. (See *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*, and *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, *supra*). See also dissenting opinion of Mr. Justice Holmes in the *Panhandle Oil Company v. Miss. ex rel. Knox*, 277 U. S. 218, *supra*.

Under these accepted principles, it is pertinent to consider the amount of the tax and the resulting economic burden whether imposed under a lump-sum or cost-plus contract, or upon the gross proceeds of the contract. On examination of the tax here involved, although it is at the same rate as approved by the Court in the cases of *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, and *Silas Mason and Co. v. Tax Comm.*, 302 U. S. 186, *supra*, it excludes any percentage upon labor or service, and is, therefore, less burdensome. As expressed in the dissenting opinion of Mr. Justice Brown in the Court below in the companion case of *United States, et al v. John C. Curry, etc.* 3 So. (2d) 582, the resulting burden, if any, imposed upon the United States by

virtue of the tax imposed upon the contractors is not a statutory exaction, but is a contractual liability. Such liability was duly authorized, was voluntarily assumed, and is valid and binding upon the Government.

Garford Motor Truck Co. v. United States, 57 C. Cls. 404 (1922).

Wm. Cramp & Sons Ship & Machine Building Co. v. United States, 72 C. Cls. 146 (1931).

Asiatic Petroleum Co. (N. Y.) Ltd. v. United States, 78 C. Cls. 696 (1934).

Under the provisions of Article II and particularly Article II(m) of the contract (R. 52-54), the Government stipulated that the contractors should be required to pay such taxes as expenditures constituting a part of the cost of work or construction, to be reimbursed to the contractors as other expenditures included in the cost. The tax, therefore, as to the Government, constitutes an indirect or consequential economic burden contractually assumed.

As the tax is nondiscriminatory and is measured by the amount or extent of the sales involved, it is clearly valid as a levy imposed upon independent contractors, regardless of the form or terms of the contract.

In a statement of policy contained in a memorandum from Acting Attorney General, Francis Biddle,

to John H. Hedren, Chairman of the Committee on Uniform Sales Taxation, National Association of Tax Administrators, released June 8, 1941, among other things, it was said:

"At least until the situation receives further clarification, no attempt will be made by this Department to challenge the validity of state sales taxes levied solely on vendors, which they are legally empowered to absorb as part of the sales price, or to contest gross receipts taxes or any other non-discriminatory state taxes levied upon the fees paid by the Government to contractors. Where the tax is upon the vendor or upon the earnings of the contractor, the Federal Government itself is not the subject of state taxation and the incidental economic effect of such taxes upon the Federal Government should not be the basis of immunizing the individual."

From this, it is obvious that the attack here made upon the Alabama sales tax upon the contractors' purchases of materials is not on account of the economic burden thus cast upon the Government under the reimbursement provision of the contract, but is based upon the complaint that the vendor, instead of absorbing the tax and thereby passing on the tax as an increase in the price, is required to pass the tax on as tax, by adding to the price an amount equal to the amount of the tax. This objection is based upon form instead of substance. In considering the constitutional questions here involved, in which the

States are so vitally concerned, we believe that the realistic effect and substance of things should control over matters of mere form. Cf. *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 508, *supra*.

II.

THE UNITED STATES CONSENTED TO THE TAX UPON THE CONTRACTORS.

Although the power of the State to impose a non-discriminatory tax upon independent contractors employed by the Government is not dependent upon the consent of Congress; and while it is not conceded that the contractors are instrumentalities of the United States entitled to assert its implied constitutional immunity from State taxation, nor that Congress possesses the power to exempt private corporations, partnerships or individuals, operating for gain, from the payment of their share of State taxation, it is pertinent to trace and consider the history of the cost-plus form of contract, and the legislation under which the contract here involved was expressly authorized. Such form of contract appears to have been first authorized in the Act of April 25, 1939 (Public No. 703, 76th Congress, 2d Session, c. 508).

A copy of the form of contract executed pursuant to the Act of April 25, 1939, is shown in the above mentioned pamphlet published by the Navy Depart-

ment in May, 1940, and copies of all of such contracts were required to be reported annually by the Secretary of the Navy to Congress (Section 4 (e) of the Act of April 25, 1939). There are the following points of difference between the original contract and the contract in the case at bar, viz: (1) The original form required the contractors to purchase materials, but contained no specific provisions in the contract prohibiting the contractors from binding or purporting to bind the Government in purchasing materials. This provision was added in the contract here under consideration (Article V 1 (c), R. 60). (2) The original form of such contract contained no provision reserving to the Government the right to make direct purchases of materials in such manner as to be immune from State taxation. The contract here under consideration in Article II, paragraph 3, expressly reserves to the Government the right to furnish materials (R. 56).

Article 27 (o) of the original form of contract is substantially the same as Article II (m) of the present contract relating to payment of State taxes as a part of the cost of the work, and providing for reimbursement of the contractors for such expenditures.

Certain officers of the Government had ruled that the contractors in purchasing materials were acting as agents of the United States, and that the transactions, therefore, were immune from taxation, relying upon the case of *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U. S. 218, *supra*, although such case

had been limited and distinguished, if not overruled, by the decision of this Court in the case of *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*.⁽⁶⁾

Notwithstanding such construction by the administrative officers of the Government, certain States demanded the payment of sales taxes from such contractors. To meet this situation, Congress was requested to authorize the Secretary of Navy to designate the contractors as agents for the United States in purchasing materials, and to exempt them from Federal, State and local taxation.⁽⁷⁾

In the consideration of H. R. 8438, (Act of June 11, 1940, Public, No. 588, 76th Congress, 3d Session, c. 313), relating to construction in furtherance of the National Defense Program, the Senate adopted Amendment No. 120 which read as follows:

"The provisions of section 4 of the act approved April 25, 1939 (53 Stat. 590-592) shall be applicable to all public-works and public-utilities projects mentioned in this act: Provided that all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held

(6) Commentaries on "Cost-Plus-a-Fixed Fee" Contracts with Particular Reference to United States Navy Contracts Under the Bureau of Yards and Docks.

(7) Hearings before Senate Sub Committee of the Committee on Appropriations, Navy Department Bill for 1941, pp. 16, 17.

to be agents of the United States for the purposes of such contracts and all purchases under such contracts shall be exempt from Federal, State, and local taxes."

Upon the consideration of this amendment in the House on June 4, 1940, there was an extended debate thereon particularly with respect to the proviso therein, its purposes and effect (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539). Finally the original Senate Amendment No. 120 was rejected and in lieu thereof the House adopted the following amendment in which the Senate concurred:

"The provisions of section 4 of the act approved April 25, 1939 (53 Stat. 590-592), shall be applicable to all public-works and public-utilities projects mentioned in this act, regardless of location."

In the House Debate⁽⁸⁾ the opponents of the proposal embodied in the proviso vigorously contended that the proposal, if adopted, would interfere with State and local revenues needed to provide additional roads, schools, and other facilities and protection made increasingly necessary as a result of the establishment of military camps and other defense projects; and, that it was a dangerous precedent which might result in an aftermath of numerous claims against the Government.

(8) Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539.

Evidently realizing that Congress was without power to merely exempt contractors (private corporations and individuals) from the payment of nondiscriminatory State taxation, so long as they continued to purchase materials as independent contractors, it is significant that the authority requested in Senate Amendment No. 120 to H. R. 8438 was to change the *status* of the cost-plus-a-fixed-fee contractors to that of agents of the Government in making purchases of materials, and thus authorize them to purchase materials in the name of the Government or as agents of the Government with the resulting immunity from taxation. But this requested authority was denied.

After the defeat of this proposal, the Congress passed the Act of July 2, 1940, Public No. 703, 76th Cong., 3d. Sess., c. 508, under which the "Cost-Plus-A-Fixed-Fee Construction Contract" involved in this case was expressly authorized to be executed. The form of contract executed in this case is shown to be C. P. F. F. Form No. 1, approved by the Assistant Secretary of War July 12, 1940, and in view of the denial by Congress of the authority to authorize the contractors to purchase materials as agents for the Government, a provision was incorporated in the contract to prohibit the contractors from purchasing as agents or even from purporting to bind the United States or the Contracting Officer, (Article V 1 (c) of the contract R. 60); and at the same time another new provision was inserted, reserving the right of the Government to fur-

nish any materials under the contract (Article II, paragraph 3 of the Contract R. 56). The contract retained therein in substance the original provisions for the payment of the contractors of State and local taxes required to be paid by them in the purchase of materials, treating such taxes as expenditures constituting a part of the cost of construction, reimbursable as other items of cost (Article II and Article II (m) of the contract R. 52-57).

In view of the decision of this Court in *James v. Dravo Contracting Company*, 302 U. S. 134, *supra*, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, *supra*, and numerous decisions of State and Federal Courts based thereon, and the denial by Congress of authority to designate the contractors as agents of the Government in purchasing materials so that immunity from State taxation might be conferred upon them, it was no doubt necessary, and we assume the contractors demanded that the tax provision, Article II (m), be included in the contract. However, in order to provide for some means by which materials might be purchased without the payment of such State taxes, the Government also inserted the provision reserving the right to make direct purchases of materials (Article II, paragraph 3 of the Contract, R. 56). But, the failure of the Government to exercise such reserved right under the contract to purchase materials directly, immune from State taxation, constituted a waiver of any right to claim or assert such immunity with respect to the purchases involved in this case.

The action of Congress in expressly authorizing the execution of such form of contract, in the light of its debates and hearings thereon, and its denial of requested authority thereunder to authorize the contractors to act as agents for the Government in purchasing materials, reveals an unmistakable intent of Congress to leave the contractors in their status as independent contractors subject to State taxation; and such Congressional action was sufficient to authorize the Secretary of War to retain in the contract the provisions including such taxes as an item of expenditure constituting a part of the cost of construction, to be paid by the contractors, and thereafter to be reimbursed to them, not as taxes, but as an expenditure included in the total cost of construction.

The contract and the tax payment and reimbursement provisions thereof are valid, and were as specifically authorized as if Congress in the Act of July 2, 1940 (Public No. 703), had expressly mentioned the particular contract involved in this case. Furthermore, if consent of Congress either for the imposition of the tax upon the contractors or the inclusion thereof as one of the reimbursable items comprising the total cost of construction under the contract was necessary, such consent was embodied in the Act of July 2, 1940 (Public No. 703), under which the contract was executed.

The form of contract and the relationship of the contractor which was approved and authorized by

the Congress clearly contemplated that the contractors would be independent contractors, subject to all of the disabilities and incidents of State taxation, except, of course, there was no implication that Congress consented to or waived any right of the contractors or the Government to object to a discriminatory tax. Therefore, if the contract executed pursuant to the Act of July 2, 1940 (Public No. 703), is subject to the construction that it authorized the contractors to purchase materials as agents for the United States Government, and that a relationship of principal and agent was thus created, the contract would be invalid as in conflict with the clearly expressed intent of Congress in its authorization.

In determining the proper construction and the legislative intent of an Act, the Court may consider its history, as well as that of companion or related measures, especially when enacted at the same legislative session. *United States v. Katz*, 271 U. S. 354, 557; *Wisc. Railroad Comm. v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 588, 589; *Duplex Co. v. Deering*, 254 U. S. 443, 474, 475; *Penn. R. R. v. International Coal Co.*, 230 U. S. 184, 198, 199.

Extended debate upon a statutory provision which was omitted from an Act on final passage has been held to evince an intent that the Act should be construed as not making the change contemplated by the omitted provision. *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320, (1934).

We assume that the Court will take judicial knowledge of the unprecedented National Defense Program, and the burden thus cast upon the States and local Governments to provide the governmental services demanded, particularly for schools, roads, fire and police protection, and measures affecting public health. As an illustration, we cite information from the State Department of Education with respect to increase in school enrollment in 1941 over 1940 in Talladega County, Alabama, in which County a large munitions plant is being constructed at Childersburg, Alabama. (See letter from Dr. A. H. Collins, State Superintendent of Education, Appendix, *infra*, pp. 82, 83).

Realizing the inability of the local Governments adequately to cope with the situation, Congress adopted the Lanham Act, approved July 28, 1941 (Public Law 137, 77th Congress, 1st Sess., c. 260),

appropriating \$150,000,000 to be expended to accomplish its purposes.⁽⁹⁾

III

THE SALES INVOLVED WERE NOT MADE WITHIN THE MILITARY RESERVATION OF FORT McCLELLAN, ALABAMA.

The record shows that the orders were sent to the respondent, King and Boozer, whose place of business was at Anniston, Alabama, not upon the Government reservation; and the materials were inspected and received at the place of business of the vendor, after being loaded upon the trucks of a contract carrier, and were subsequently transported by

(9) The purposes of this Act are set forth in Title II, Sections 201 and 202, the pertinent provisions of which are:

"Sec. 201. It is hereby declared to be the policy of this title to provide means by which public works may be acquired, maintained, and operated in the areas described in section 202. As used in this title, the term 'public work' means any facility necessary for carrying on community life substantially expanded by the national-defense program, but the activities authorized under this title shall be devoted primarily to schools, waterworks, sewers, sewage, garbage and refuse disposal facilities, public sanitary facilities, works for the treatment and purification of water, hospitals and other places for the care of the sick, recreational facilities, and streets and access roads.

"Sec. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage— * * * "

such means to a point within Fort McClellan (R. 43, 44). It is our contention that the sale was therefore consummated before the transportation from Anniston to Fort McClellan.

By the passage of the Buck Resolution (Public No. 819, 76th Congress, 3d Session, c. 787), effective after December 1, 1940, any objection to the imposition of State sales taxes within any Federal area are expressly removed, and as the sales involved occurred subsequently to the effective date of such Act, any question which might have arisen as to the application of the Sales Tax Act with respect to sales made within a Federal area has been eliminated. For such reasons, it is evident that the Court below did not deem it necessary to discuss any objection to the tax upon the ground that the sale was made within an area over which the State had ceded to the United States exclusive jurisdiction.

CONCLUSION

As the tax was nondiscriminatory, and the contractors purchased the material as independent contractors, and were not instrumentalities of the United States, they were not immune from nondiscriminatory State taxation; and for the reason that the Government, with the consent and approval of Congress, voluntarily stipulated in the contract for the payment of the tax by the contractors, and for the reimbursement thereof, as an expenditure constituting a part of the cost of construction, and the Government failed to exercise its reserved right to purchase the materials directly, the tax imposed was within the taxing power of the State, and is not repugnant to the Constitution.

The holding of the Court below to the contrary was clearly erroneous, and its decision should be reversed by this Court.

Respectfully submitted,

✓ THOMAS S. LAWSON
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✓ JOHN W. LAPSLEY
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✓ J. EDWARD THORNTON
Assistant Attorney General

GARDNER F. GOODWYN, JR.
Of Counsel

APPENDIX

STATE OF ALABAMA
DEPARTMENT OF EDUCATION
MONTGOMERY

October 6, 1941

Honorable T. S. Lawson
Attorney General of Alabama
Montgomery, Alabama
Dear Mr. Lawson:

In answer to your inquiry concerning the effect of the National Defense Program on the public schools of Alabama, permit me to state the following:

1. The location of new defense industries and military establishments in Alabama has greatly increased the educational load in several defense areas. Official reports are not available on 1941-42 school enrollment in all defense areas but preliminary reports indicate considerable increases in certain areas. For instance, reports from Talladega County indicate an increase in enrollment of 1,300 children, or 25 per cent, in that county. This increase in enrollment is exclusively due to the location of the powder plant in the Childersburg area of Talladega County. Increases in attendance are also indicated in other areas as follows: Mobile,

Selma, Montgomery, Sheffield, Huntsville, and Anniston. These increases in attendance call for increased expenditures for housing, maintenance, and operation.

2. The Federal Defense Program has caused an increase in the cost of living to teachers throughout the State. Sufficient funds are not available to boards of education to increase teachers' salaries in order to take care of increased living costs.
3. The average school term of Alabama is the shortest in the Nation with the exception of Mississippi. The average salary paid Alabama teachers is the lowest in the Nation with the exception of Arkansas and Mississippi.

All available evidence indicates that the public schools of Alabama are in dire need of additional revenue.

Sincerely yours,

A. H. COLLINS

State Superintendent of Education

AHC:JM

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 18:

Section 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning: (a). The term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b). The term "department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d). The term "tax year" or "taxable year" means the calendar year. (e). The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale. (f). The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property (and including the proceeds from the sale of any properly handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account

of losses; provided that cash discounts allowed and taken on sales shall not be included, and "gross proceeds of sales" shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit. (g). The word "taxpayer" means any person liable for taxes hereunder. (h). The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in, (not including, however, interest, discounts, rentals of real estate or royalties) and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever and without any deductions on account of losses. (i). The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (j). The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as

wholesales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (k). The word "business", as used in this Act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

Section II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a). Upon every person, firm or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever,

including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debts or stocks), an amount equal to two per cent (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. (b). Upon every person, firm or corporation engaged, or continuing within this State, in the business of conducting, or operating, places of amusement and/or entertainment, billiard and pool rooms, bowling alleys, amusement devices, musical devices, theaters, opera houses, moving picture shows, vaudevilles, amusement parks, athletic contests, including wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games, (including athletic contests conducted by or under the auspices of any educational institution within this state, or any athletic association thereof, or other association whether such institution or association be a denominational, a state, a county, or a municipal institution or association or a state, county, or city school, or other institution, association or school), skating rinks, race tracks, golf courses, or any other place at which any exhibition,

display, amusement or entertainment is offered to the public or place or places where an admission fee is charged, including public bathing places, public dance halls of every kind and description within the State of Alabama, an amount equal to two per cent (2%) of the gross receipts of any such business. (c). Upon every person, firm or corporation engaged or

continuing within this State in the business of selling any automotive vehicle, an amount equal to one-half of one-per cent of the gross proceeds of the sale of said automotive vehicle.

Section V. EXEMPTIONS: There are however exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under this Act the following: (a). The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b). The gross proceeds of sales of tangible personal property to the State of Alabama to the counties within the State, and to incorporated municipalities of the State of Alabama. *****

Section VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month

in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department, a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. Provided, however, that when the total tax for which any person liable under this Act does not exceed ten (10) dollars, for any month, a quarterly return and remittance in lieu of the monthly returns may be made on or before the 20th day of the month next succeeding the end of the quarter for which the tax is due, when specially authorized by the Department of Revenue, and under such rules and regulations as may be prescribed. The Department of Revenue, for good cause, may extend the time for making any return required under the provisions of this act, but the time for filing any such return shall not be extended for a period greater than thirty days from the date such return is due to be made.

Section VII. Any person taxable under this Act, having cash and credit sales, may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collection of such credit sales shall have been made.

Section XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

Section XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months.

Each month of failure to make such reports shall constitute a separate offense, and each refusal of a written demand of the Department to examine, inspect or audit such records shall constitute a separate offense.

Section XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) per cent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

Section XIV. Any person who fails to pay the tax herein levied within the time required by this Act shall pay, in addition to the tax, a penalty of ten (10%) per cent of the amount of tax due, together

with interest thereon at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date at which the tax herein levied became due and payable, such penalty and interest to be assessed and collected as a part of the tax.

Section XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten (10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one ($\frac{1}{2}$ of 1%) per cent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a wilful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) per cent of the tax. Provided that upon appeal such action shall be reviewable.

Section XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgment of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. If upon such hearing the Department finds the amount due to be different from that originally assessed, it shall make the assessment final in the correct amount and in all cases shall notify the taxpayer of the assessment as finally fixed. Provided a notice by United States mail addressed to the taxpayer's last known place of business shall be sufficient. Any assessment made by the Department shall prima facie be correct upon appeal.

Section XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made, he may appeal in all respects in the same manner provided by Act. No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final.

Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

Section XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue Laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty (\$50.00) Dollars nor more than One Hundred (\$100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both

such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

Section XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this act.

Section XXIX. The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided.

Section XXXI. The administration of this act is vested in and shall be exercised by the State Department of Revenue, except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be under the jurisdiction and supervision of the Department, and the Department may require the assistance of, and act through the prosecuting attorney, or deputy solicitor of any county, or any circuit solicitor, and the Attorney General of the State, and legal counsel of the State Department of Revenue. The Department shall appoint as needed such

agents, clerks, and stenographers as may be necessary to enforce provisions of this act who shall serve at the will of the Commissioner of the Department, and who shall perform such duties as may be required, and such duly appointed and qualified agents are authorized to act for the Department as it may direct and as is authorized by law. Each such agent shall execute a bond in the sum of five thousand (\$5,000.00) dollars for the faithful performance of his duties.

Section XXXII. The Department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

Section XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no discount shall be authorized or allowed upon any taxes which are not paid before delinquency as in this Act provided.

Section XXXIX. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause

or clauses, phrase or phrases, word or words of this Act shall be held to be unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this Act. It is hereby declared to be the legislative intent that this Act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section, or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such

structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat.

2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

**Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * *

MILITARY POSTS

* * * * * emergency construction, \$47,976,962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1839; 40 U. S. C. 255); * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong.,
8d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property

sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.

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FILED

OCT 24 1941

SUPREME COURT OF THE UNITED STATES

CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1941

No. 602

THE STATE OF ALABAMA,

Petitioner,

vs.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM COBB
KING AND SIMON ELBERT BOOZER, RESIDENTS OF CALHOUN
COUNTY, ALABAMA, AND THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA.

REPLY BRIEF ON BEHALF OF PETITIONER.

✓ THOMAS S. LAWSON,
Attorney General of Alabama;

✓ JOHN W. LAPSLEY,

✓ J. EDWARD THORNTON,

Assistant Attorneys General of Alabama,

Counsel for Petitioner.

GARDNER F. GOODWYN, JR.,

Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

THE STATE OF ALABAMA,

vs.

Petitioner,

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM COBB
KING AND SIMON ELBERT BOOZER, RESIDENTS OF CALHOUN
COUNTY, ALABAMA, AND THE UNITED STATES OF AMERICA,
Intervener.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA.

REPLY BRIEF ON BEHALF OF PETITIONER.

In reply to the Brief for the United States, the petitioner ⁴¹
submits the following:

I.

Title Provision in the Contract, Section 3, Article I.

Petitioner calls attention to the omission (on page 13 of the Government's Brief) of any mention of the qualifying provision in the section of the contract relating to title. Such qualifying provision reads as follows: "These provisions as to title being vested in the Government shall not

operate to relieve the Contractor from any duties imposed under the terms of this contract." It will also be noted that such brief (p. 13) omits mention of the additional requirement for "acceptance in writing by the Contracting Officer". These omissions likewise appear in the discussion of the title provision on page 89 and 94 of the Brief for the Government.

It is the further contention of the petitioner that under the provisions of the Act of August 7, 1939, Public No. 309, 53 Stat. 1239, it was the intent of Congress that the acceptance of title to materials was authorized for the purpose of minimizing insurance costs, as indicated by the following provision of such Act, namely:

"(c) In any project the contract for which is negotiated under authority of this section, the Secretary of War may waive the requirement of a performance and a payment bond *and may accept materials required for any such project at such place or places as he may deem necessary to minimize insurance costs.*"

In further considering the purposes of the title provision in the contract, see Section 1(c) of the Act of July 2, 1940 (Appendix, *infra*, p. —), under which the Secretary of War was authorized to advance payments to contractors for supplies or construction not to exceed 30 per centum of the contract price, upon such terms, conditions and adequate security as the Secretary of War shall prescribe. This provision further supports our insistence that the provisions of the contract relating to the vesting in the Government of title to materials (if the same became effective in this case, which we do not concede), were in the nature of a security or pledge, the contractor remaining the beneficial owner. This construction seems to be the only consistent explanation of the arrangement; and, of course, the contractor's pledge of his materials did not affect the taxable character of his purchaser.

Petitioner further wishes to correct the statement made in the Brief on behalf of the Government (Br., p. 89), where it is stated that petitioner "apparently does not deny that title went directly to the United States (Br. 38)." We did not so intend, nor do we believe our Brief is subject to such construction. No such admission was intended.

II.

No Immunity by Reason of the Status of the Contractor.

In the Brief on behalf of the Government (pp. 94-96), as we construe it, it is conceded that the status of the Contractor was not that of an agency or instrumentality of the Government, clothed with the implied constitutional immunity of the sovereign from State taxation.

Contractor Not Authorized to Act as Agent for the United States—No Relationship of Principal and Agent.

Further, as we construe it, the Government concedes (pp. 111-117 of its Brief) that in the consideration of other National Defense Acts passed prior to the Act under which the contract here involved was authorized, Congress twice refused to adopt amendments proposed to authorize contractors under cost-plus-a-fixed-fee contracts to be designated as agents of the Government and in the purchase of materials to be exempt from Federal, State or local taxes. (Act of June 11, 1940 and Act of June 15, 1940.) ¹

From the foregoing we conclude the Government admits that the purchases were not made by the contractor acting as agent for the Government, in such manner as to bind the Government as a disclosed or undisclosed principal. While admitting that the Contractor became individually liable to the vendor, and paid the purchase price with his

¹ See pp. 112-116, and notes in Government's Brief.

own funds, it is contended on behalf of the Government that the United States was nevertheless the purchaser, and that the title did not pass to or through the Contractor, but passed directly from the vendor to the United States.

Such contention, as we construe it, is inconsistent, and presents a practical as well as a legal anomaly.

As said by Judge Somerville, in *Gillis v. White*, 214 Ala. 22, 106 So. 166 (1925):

“When one contracts merely as the agent of a disclosed principal, he binds either his principal or himself, but not both; and a joint action against both involves a practical as well as a legal anomaly.”

See 3 *Corpus Juris*, Section 241, pp. 165, 166.

See also Restatement of the Law, Vol. 1, Section 147 (a) and (b), pp. 375, 376, where it is stated:

“b. If it is agreed that the third party is to contract solely with the agent, the principal does not become a party to the transaction; * * *.”

See *Standard Oil Co. v. Fontenot*, decided October 17, 1941 (pp. 2, 25, Supplemental Brief, *amicus curiae*, on behalf of the State of Louisiana).

III.

History of Various Acts Relating to Cost-Plus-A-Fixed-Fee Form of Contracts.

See Appendix, *infra*, pages —, setting forth pertinent provisions of Acts of Congress adopted prior to the Act of July 2, 1940 under which the contract in this case was executed, and of certain subsequent Acts relating to cost-plus-a-fixed-fee contract.

An examination of the pertinent provisions of such Acts shows that when Congress in the Act of July 2, 1940 authorized the use of the cost-plus-a-fixed-fee form of contract,

it had reference to the form previously authorized, and intended that such contracts should conform to the provisions of such previous Acts, and be subject to the conditions and limitations therein provided. In this connection, it is assumed that both the Navy and War Department contracts in such form had been previously reported to and filed with Congress pursuant to the Acts of April 25, 1939 and August 7, 1939, respectively.

IV.

The Sale to the Contractors Was Taxable.

If the Contractors purchased as independent Contractors, which we contend was the case, it is conceded that the tax constituted an "applicable" State tax which is valid and should be paid by the Contractors as a part of cost of construction.

On the other hand, if the Contractors, acting as authorized agents for the Government (which we do not concede was the case), purchased in their own names with the stipulation that the Government was not expressly or impliedly bound by the contract of purchase entered into between King and Boozer and the Contractors, it is our contention that the sale was consummated between King and Boozer and the Contractors upon delivery of the material pursuant to instructions given to the vendor, and that title thereupon necessarily passed to the Contractors, as purchasers, in such manner as to constitute a taxable transaction under the Alabama Sales Tax Act. The incidence of the tax was the sale, which we contend under any possible legal construction was from the vendor to the Contractors. Furthermore, as the materials were sold by King and Boozer to the Contractors, the transaction was taxable even if the vendor had been instructed to deliver the materials directly to the United States, which, of course, we do not concede was done, as the materials were to be shipped or delivered to the Con-

structing Quartermaster "for the account of" Dunn & Hodgson, the Contractors.

Conclusion.

It is, therefore, our conclusion that even though the Alabama Sales Tax Act may be construed as imposing a tax upon the vendee, as the Contractors were the purchasers—the vendees—in this case, and as the tax is non-discriminatory, it is not repugnant to the Constitution of the United States; and that its validity is in this case analogous to a non-discriminatory tax imposed solely upon the vendor, which the Government concedes should be held valid.

Respectfully submitted,

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APPENDIX.

1. Act of April 25, 1939 (H. R. 4278), Public No. 43, 53 Stat. 590.

Sec. 4 authorizes use of "contracts upon a cost-plus-a-fixed-fee basis" to enable the Secretary of the Navy "to accomplish without delay or excessive cost" certain projects outside the continental United States.

(a) Fee not to exceed "*10 per centum of the estimated cost of the contract, exclusive of the fee.*" (Sec. 4(a))

(b) Contract to be made "*upon such terms and conditions as the Secretary of the Navy may determine to be fair and equitable and in the interest of national defense.*" (Sec. 4(b))

(c) Naval officer to be detailed as a representative of the Contracting Officer, to attend meetings of Contractor etc. "*for the purpose of submitting propositions, propounding questions, and receiving information relative to any matter within the purview of the contract with the intent and for the purpose of safeguarding the interests of the United States, coordinating efforts, and promoting mutually beneficial relationships, and making decisions within the scope of his delegated authority and not in conflict with any provision of the contract.*" (Sec. 4(b))

(d) Secretary of Navy may waive performance and payment bond, "*and may accept materials required for such project at such place or places as he may deem necessary to minimize insurance costs.*" (Sec. 4(c))

(e) Contract may contain provisions under which "*any loss of or major damage to the plant, materials, or supplies of any contractor, not due to negligence or fault of the contractor, or his agents or servants, while the same is necessarily in transit upon or lying in the open sea, will be investigated by a board of naval officers and reported to Congress with recommendations.*" (Sec. 4(d))

(f) Secretary of the Navy required annually to report to Congress all contracts executed under such section, to-

gether with copies of the contracts so executed. (Italics supplied.)

2. Act of August 7, 1939 (S. 2562), Public No. 309, 53 Stat. 1239.

Section 1 authorized use of "contracts upon a cost-plus-a-fixed-fee basis" to enable the Secretary of War to accomplish without delay or excessive costs certain public-works in Alaska and the Panama Canal Zone, in connection with the National defense. This Act contains substantially the same provisions, conditions and limitations as in the Act of April 25, 1939, except the authority is vested in the Secretary of War and Army officers instead of the Secretary of the Navy and Naval officers.

For brevity, reference is here made to comments upon provisions in the Act of April 25, 1939.

3. Act of June 11, 1940 (H. R. 8438), Public No. 588, 54 Stat. 265, 294, relating to the Navy Department, provided:

"The provisions of Section 4 of the Act approved April 25, 1939 (53 Stat. 590-592), shall be applicable to all public works and public utilities projects mentioned in this Act regardless of location."

4. Act of June 26, 1940 (H. R. 10055), Public No. 667, 54 Stat. 599, 608, made provisions of the Act of April 25, 1939, applicable to Title III relating to Navy Department construction, but reduced the contractor's fee to 6%.

5. Act of June 28, 1940 (H. R. 9822), Public No. 671, 54 Stat. 676, 677, contained a provision: "That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this subsection, *or any War Department contract entered into in the form of cost-plus-a-fixed fee, shall not exceed 7 per centum of the estimated cost of the contract* (exclusive of the fee as determined by the Secretary of the Navy or the *Secretary of War*, as the case may be)." (Italics supplied.)

6. Act of July 2, 1940 (H. R. 9850), Public No. 703, 54 Stat. 712, 713. This is one of the Acts specifically mentioned in and under which the Contract involved in this

case was executed. In Section 1(a), it is provided: "That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." In Section 1(c), it is provided: "(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of national defense he is authorized, from appropriations available therefor, *to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe.* (Italics supplied.)

7. Act of September 9, 1940 (H. R. 10263), Public No. 781, 54 Stat. 872, 873, provided: "That the Secretary of War may, with respect to contracts for public works for the Military Establishment entered into upon a cost-plus-a-fixed-fee basis out of funds appropriated for the fiscal year 1941, or authorized to be entered into prior to July 1, 1941, waive the requirements as to performance and payment bonds of the Act approved August 24, 1935 (49 Stat. 793; 40 U. S. C. 270a): Provided further, That the fixed fee to be paid the contractor as a result of any such public works contract hereafter entered into shall not exceed 6 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of War."

8. Act of October 8, 1940 (H. R. 10572), Public No. 800, 54 Stat. 965, 967, 968, amended Public No. 781, so as to reduce the contractor's fee from 7% to 6%; and provided for all such contracts to be reported to Congress monthly by the Secretary of War and the Secretary of the Navy—first reports to cover the period July 1 to October 31, 1940.



RE COPY

Nos. 602, 603

In the Supreme Court of the United States

OCTOBER TERM, 1941

STATE OF ALABAMA, PETITIONER

v.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM
COBB KING AND SIMON ELBERT BOOZER, AND THE
UNITED STATES OF AMERICA, INTERVENER

JOHN C. CURRY, INDIVIDUALLY AND AS COMMIS-
SIONER OF REVENUE OF THE STATE OF ALABAMA,
PETITIONER

v.

UNITED STATES OF AMERICA AND DUNN CONSTRUC-
TION COMPANY, INC., AND JOHN S. HODGSON AND
COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
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MEMORANDUM FOR THE RESPONDENTS



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MEMORANDUM FOR THE RESPONDENTS

The respondents join in the petitions for writs of certiorari.

The Supreme Court of Alabama held in the *King & Boozer* case that a contractor, building a tent camp at Fort McClellan for the United States

under a cost-plus-a-fixed-fee contract, was exempt from the state sales tax in making its purchases of material used in the construction. It similarly held in the *Dunn Construction* case that the same contractor was exempt from the state tax upon the storage, use or consumption of personal property. The decisions present questions of importance and urgency.

The current defense program involves a very large volume of work, performed in every state of the union, by cost-plus-a-fixed-fee contractors. A preliminary and rough advance estimate indicates that the imposition of state sales and use taxes may result in a tax liability of about \$100,000,000 a year with respect to the Government's construction and supply program undertaken through cost-plus-a-fixed-fee contractors. An authoritative determination of the difficult constitutional and statutory questions upon which turn the issue of liability or immunity is extremely desirable.

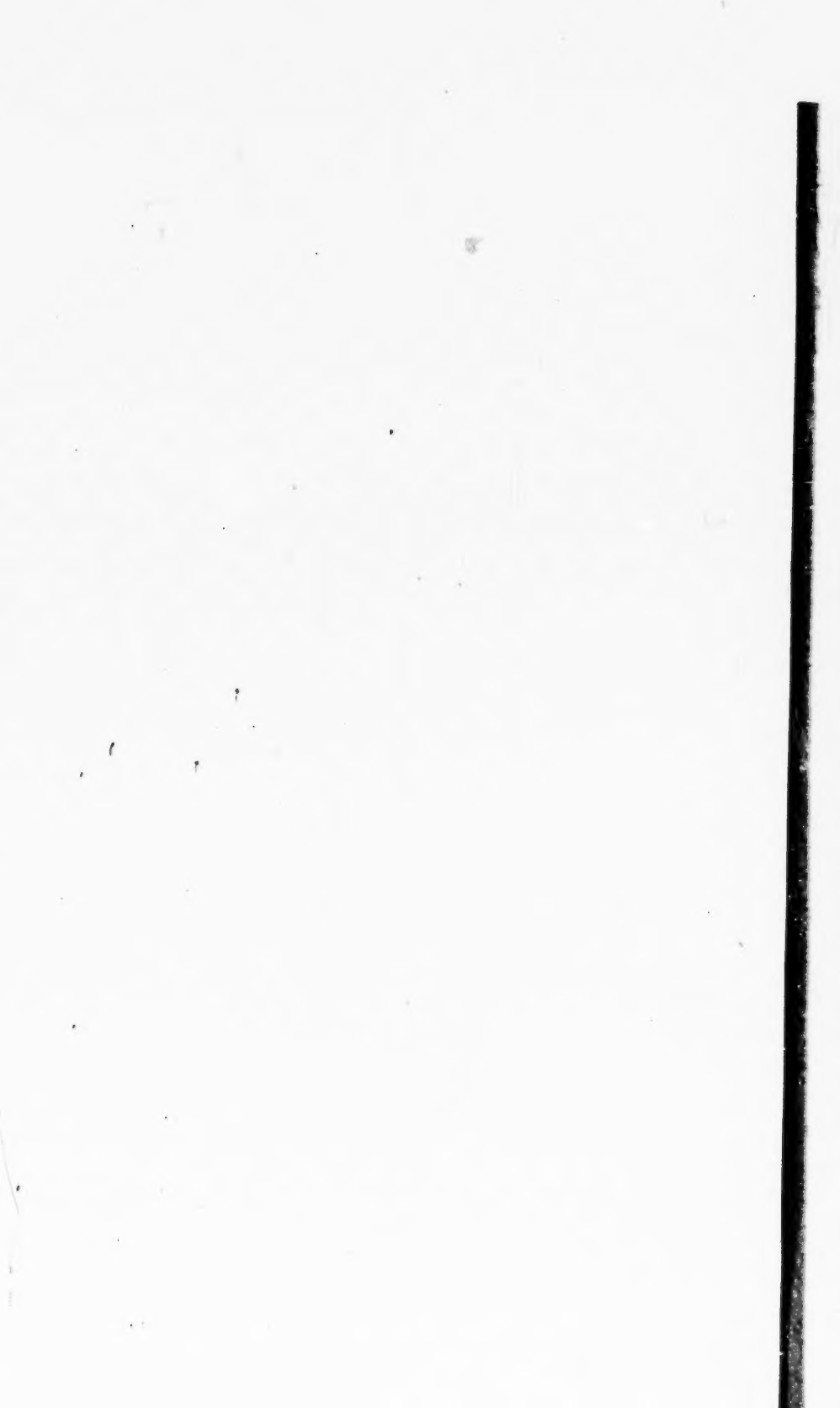
Wherefore, it is respectfully submitted that these petitions for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General,¹
FRED L. BLACKMON,
Attorney for King & Boozer.

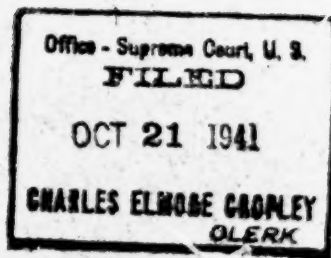
SEPTEMBER 1941.

¹ Both the United States and the partnership of Dunn Construction Company, Inc., and John S. Hodgson and Company are represented by the Department of Justice in this proceeding.





FILE COPY



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OCTOBER TERM, 1941

THE STATE OF ALABAMA, PETITIONER

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COBB KING AND SIMON ELBERT BOOZER, RESIDENTS
OF CALHOUN COUNTY, ALABAMA, AND THE UNITED
STATES OF AMERICA, INTERVENER**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA**

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 602

THE STATE OF ALABAMA, PETITIONER

v.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM COBB KING AND SIMON ELBERT BOOZER, RESIDENTS OF CALHOUN COUNTY, ALABAMA, AND THE UNITED STATES OF AMERICA, INTERVENER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Circuit Court of Montgomery County, Alabama, delivered no opinion; its final decree is found at R. 132-134. The opinions of the Supreme Court of Alabama (R. 140-155) are reported in 3 So. (2d) 572.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 29, 1941 (R. 139-140).

(1)

The petition for a writ of certiorari was filed on September 11, 1941, and was granted on October 13, 1941. The jurisdiction of this Court rests on section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The respondent partnership sold lumber to a cost-plus-a-fixed-fee contractor engaged in constructing an Army camp for the United States and was assessed for state sales taxes upon the transaction. The questions are:¹

1. Whether the United States in purchasing goods is subject to the Alabama sales tax.

2. Whether that immunity, if it exists, is retained when the United States makes its purchases through a cost-plus-a-fixed-fee contractor.

STATUTES INVOLVED

The relevant portions of the federal statutes authorizing this contract and of the Alabama sales tax statute are set out in Appendix A, *infra*, pp. 119-131.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

1. *This Litigation.*—On May 15, 1941, the State Department of Revenue for the State of Alabama,

¹ A third question, as to the territorial jurisdiction of the State to impose the tax, was argued but not decided below and need not be considered here (see *infra*, pp. 25-26, n. 1).

pursuant to Act No. 18 of the General Acts of Alabama, 1939 (Appendix A, *infra*, pp. 121-131) made a proposed assessment for sales taxes in the amount of \$1,372.75, inclusive of penalties, upon the partnership of King & Boozer (R. 5-6).

After due protest (R. 3-5, 8) and final assessment (R. 9-10), King & Boozer on May 16, 1941, filed a statutory appeal in equity in the Circuit Court of Montgomery County, Alabama (R. 1). The petition alleged that the assessment of May 15, 1941, was based upon the sale of tangible personal property consisting of lumber purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company,¹ as an agent and instrumentality of the United States, and in connection with the performance by the partnership of a contract with the United States (R. 1-5). The petition, together with the subsequently filed bill of complaint, prayed that the assessment be held void on the ground, among others, that the sales were immune from taxation by the State under the Constitution of the United States and the statutes of Alabama (R. 3-5, 27-31).

The State of Alabama on May 29, 1941, filed a demurrer and an answer alleging, *inter alia*, that the assessment was valid on the grounds that the sales were not made to the United States or for or

¹ The partnership is hereafter called Dunn & Hodgson.

on its behalf but were made to an independent contractor which was not such an agent or instrumentality of the United States as would entitle it to claim any immunity from tax, and that the United States in the contract with the contractor consented to the tax and waived any immunity from the tax (R. 31-40).

On May 29, 1941, the United States filed a petition for leave to intervene in the appeal of King & Boozer, on the ground that it was a real party in interest (R. 13-16). On that day the Circuit Court, over objection of the State (R. 16-19), entered an order permitting the intervention (R. 19). The petition for leave to intervene was refiled by the United States as its petition on intervention (R. 15). The State filed a demurrer and answer to the petition (R. 19-27).

On June 13, 1941, the Circuit Court entered a decree confirming the assessment of taxes made by the State Department of Revenue on May 15, 1941 (R. 132-134). The respondents appealed to the Supreme Court of Alabama (R. 134). That court on July 29, 1941, reversed (R. 139-140), with one judge dissenting (R. 154-155).

2. *The Dunn & Hodgson Contract in General.*—The Dunn Construction Company, Inc., is a privately owned corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Alabama at Birmingham, Alabama (R. 41-42). John S.

Hodgson and Company is a partnership composed of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham, Alabama (R. 42). For the purposes of this contract the two companies acted as a partnership or members of a co-venture (R. 42).

On September 9, 1940, the United States of America entered into a contract with Dunn & Hodgson for the construction of a complete tent camp, including the necessary buildings, temporary structures, utilities, and appurtenances thereto, at Fort McClellan, Alabama (R. 48-49). The contract was entered into under the authority of the Military Appropriation Act, 1941, and the Act of July 2, 1940, each *infra*, pp. 119-121, and was in effect during the period covered by the assessment of taxes involved in the present case (R. 49, 41).

The contract, in Article I, states the estimated total cost of the construction work to be in the approximate amount of \$3,204,588, exclusive of the contractor's fee (R. 50). It provides that a fixed fee of \$128,865 is to be paid to the contractor,^a which shall constitute complete compensation for its services, including profit and all general over-

^a The fixed fee, to the extent of 90 percent, shall be paid as it accrues, in monthly installments based upon the percentage of the completion of the work as determined from estimates made and approved by the Contracting Officer. Upon completion and final acceptance of the work, any unpaid balance of the fee shall be paid to the contractor (R. 58).

head expenses (R. 50). The contractor is, subject to the approval of the Contracting Officer, to be reimbursed for his actual expenditures, and for the rental of his equipment used, in the performance of the work (R. 50, 52, 55).⁴

Article I provides that the contractor shall furnish all labor, materials, tools, machinery, equipment facilities, and supplies not furnished by the Government, and shall do all things necessary for the completion of the work in accordance with the drawings, specifications, and instructions contained in the contract or to be furnished thereafter by the Contracting Officer,⁵ and subject in every detail to his supervision, direction, and instructions (R. 49-50).⁶ The Contracting Officer was

⁴ It is provided, in section 7 of Article II, that no salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work (R. 57).

⁵ It was stipulated that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer in all matters pertaining to the contract of September 9, 1940;⁴ between the United States and Dunn & Hodgson (R. 47).

⁶ The extent of the supervision by the Constructing Quartermaster over the performance of this contract is indicated

authorized at any time to make changes in or additions to the drawings and specifications, to issue additional instructions, and to require additional work, or to direct the omission of work covered by the contract (R. 50-51).

Article II provides that the contractor shall be reimbursed for his expenditures,⁷ and Article III provides the method of payment; each is fully discussed in the next section of this statement.

Article IV of the contract requires the contractor to keep such books and records as shall be satisfactory to the Contracting Officer, who shall have the right to inspect them. It also provides that the Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to the work (R. 59). Article V provides that the contractor will procure and maintain such bonds and insurance, in such forms and in such amounts and for such periods of time, as the Contracting Officer may approve or require (R. 59).

by his specific directions or authorizations to employ certain employees overtime (R. 128-130), and by his direction to pay time and a half for work done on Armistice Day (R. 129).

⁷ Article III also provides that rental shall be paid to the contractor for such construction plant as he may own and furnish, at rates not in excess of those approved by the Con-

It is further provided by Article V that at all times during the progress of the work the contractor should keep at the site a representative who should receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer might give (R. 60). The Contracting Officer, under section 1 (f) of that Article, may require the contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable (R. 60). Article XVI requires the contractor to submit to the Contracting Officer a chart showing all of his personnel, other than laborers, to be assigned to the work, together with a statement of their duties and rates of pay. The contractor is also to submit a statement of the administrative procedures to be followed. (R. 66-67.)^{*} The contractor, under section 1 (g) of Article II, is forbidden to assign any person to certain designated supervisory capacities until a statement of his qualifications has

tracting Officer. When the aggregate of payments equals the value of the equipment plus one per cent per month of payment, title shall vest in the Government. Upon completion of the work or other termination of the contract, the Government may at its option, purchase any part of the rented construction plant (R. 55-56).

^{*} The general instructions to constructing quartermasters emphasize that the contractor has been engaged because of his technical skills (R. 101, 116) but also underscore the duty of the constructing quartermaster to remedy defects in organization, plant or method of operation (R. 101). The

been submitted to and approved by the Contracting Officer (R. 53).⁹

The contractor is to enter into no subcontract for any portion of the work, except in the form prescribed by the Secretary of War, nor without the written approval of the Contracting Officer (R. 60).

Article VII provides for the use of domestic articles, with certain necessary exceptions, in the performance of the work (R. 62), while Article VIII forbids the employment of convict labor (R. 63). Article IX, relating to rates of wages, provides that the contractor or his subcontractor shall pay not less often than once a week, and without any deduction, wages at rates established by the Secretary of Labor. Payment of a greater rate of wages must be approved by the contracting officer and payment of a lesser rate of wages is a ground for termination of a contract (R. 63-65).¹⁰

Article XI requires the contractor to comply with all applicable federal, state, and municipal safety laws and building and construction codes (R. 65). Article X notes that a federal statute authorizes the application of state workmen's

Constructing Quartermaster at Camp McClellan, for example, peremptorily instructed Dunn & Hodgson to reduce its administrative and field overhead (R. 128).

⁹ The general instructions to constructing quartermasters remind them of this responsibility (R. 103).

¹⁰ On September 30 and on November 7, 1940, schedules of increased rates were approved (R. 71-76).

compensation laws to construction of public works of the United States (R. 65). And Article V requires the contractor to procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States, and of the state, territory, or subdivision thereof wherein the work is done (R. 59-60).

Article VI provides that the Government may terminate the contract for the fault of the contractor or upon the arising of conditions which make it advisable in the interest of the Government to cease work under the contract. Upon termination for the fault of the contractor the Contracting Officer may take possession of all facilities, materials, and rights, and may complete or employ any other person to complete the work. Provision is also made for the settlement of all claims of the contractor (R. 60-62).

3. *The Provisions of the Contract Governing Purchases.*—Article II of the contract provides that the contractor shall be reimbursed for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer.

(a) *Reimbursable Items.*—The items for which the contractor may be reimbursed are enumerated as follows: All labor, materials, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use

for the benefit of the work ¹¹ (R. 52). Rental actually paid by the contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant and such other equipment exceeding \$300 in value as may be necessary ¹² (R. 52). Transportation charges on materials and supplies (R. 53); transportation, unloading, and installation charges on construction plant owned or rented by the contractor ¹³ (R. 52-53); and the expenses of transportation of the necessary officers and field forces to and from work ¹⁴ (R. 53, 54). Salaries of field employees of the contractor assigned to the work, their compensation to be measured by a formula provided in the contract plus such increase as the Contracting Officer may approve (R. 53). The cost of all bonds and insurance policies required or approved

¹¹ All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government (R. 52).

¹² Contracts for the rental of construction plan by the contractor from third parties shall be in a form prescribed by the Secretary of War, shall be subject to approval by the Contracting Officer, and shall contain the same provisions entitling the Government to acquire title to the rented equipment as appear in the case of rental of such equipment from the contractor (R. 52).

¹³ Charges for transportation over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance (R. 53).

¹⁴ Unless otherwise authorized by the Contracting Officer, travel allowances and subsistence shall conform to "Standardized Government Travel Regulations" (R. 55).

by the Contracting Officer, and uninsured losses and expenses of the contractor in connection with the work which are certified by the Contracting Officer to be just and reasonable (R. 54). Upon specific approval in advance, a reasonable allowance for work done in the contractor's general offices exclusively for the work (R. 54). Payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of the contract to pay on or for any plant, equipment, process, materials, supplies, or personnel; and, subject to advance approval by the Contracting Officer, permit and license fees, and royalties on patents used, including those owned by the contractor (R. 54). Such other items which should, as specifically certified by the Contracting Officer, be included in the cost of the work (R. 54-55).

(b) *Government control of purchasing.*—The contractor is required by Article V, except on written waiver of the Contracting Officer, to reduce to writing every contract in excess of \$2,000 made by it for services, materials, supplies, machinery, or equipment; to insert a provision that such contract is assignable to the Government; and to make all contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer (R. 60). No purchases in excess of \$500 were to be made or placed without the

prior approval of the Contracting Officer (R. 60).

Section 5 of Article I requires that, except as otherwise authorized by the Contracting Officer, all materials were to be of the best quality; if the Contracting Officer requires that the contractor submit for prior approval samples of materials to be used in the work, the contractor is to make no commitments for such materials until samples have been approved by the Contracting Officer (R. 51).

The contract also requires in section 8 of Article II that the contractor take advantages of all benefits such as cash and trade discounts, rebates, credits, and commissions; in determining the actual net cost of articles and materials, such benefits which could have been obtained but for the fault of the contractor shall be deducted from the gross cost (R. 57).

(c) *Title*.—It is provided in section 3 of Article I that the title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the contractor shall be entitled to reimbursement is to vest in the Government (R. 51).

(d) *Methods of Payment*.—Article III of the contract provides the method of making the vari-

ous payments referred to in the contract. The Government will currently reimburse the contractor upon certification to and verification by the Contracting Officer of the original papers governing pay rolls for labor, invoices for materials, and other expenditures. Generally, reimbursement will be made weekly, but may be made more frequently if conditions warrant. Rental for construction plant owned and furnished by the contractor shall be paid monthly¹⁵ (R. 57).

Upon completion and final acceptance of the work, the Government shall pay to the contractor the unpaid balance of the cost and the fee, less any sum that may be necessary in connection with any unsettled claims for labor or material or any claim the Government may have against the contractor (R. 58).

(e) *Alternative Methods of Purchase.*—General provisions of Article II reserve to the Government the right to furnish any necessary materials,

¹⁵ If bills for purchase of material or equipment or for pay rolls incurred by the contractor or any subcontractors are not promptly paid by the contractor or subcontractor, as the case may be, the Contracting Officer may in his discretion withhold from payments otherwise due the contractor an amount equivalent to the amount of any such bill or pay roll. Upon the neglect or refusal of the contractor to pay such bills or pay rolls or to direct any subcontractor to make such payments within 5 days after notice from the Contracting Officer so to do, the Government shall have the right to make such payments directly, in which event certain deductions shall be made from the contractor's fee (R. 58).

construction equipment, machinery, or tools. The Government also retains the right to pay directly to common carriers any freight charges on plant, materials, and supplies and the right to pay directly all sums due from the contractor to third parties for labor, materials, or other charges (R. 56).

It was stipulated that in the performance of the contract between the contractor and the United States in some instances competitive bids for the material required for the performance of the contract were called for by the Quartermaster General. After the acceptance of one of the bids received in response to the call, he informed the Constructing Quartermaster and the contractor and requested or directed the contractor to purchase the materials from the competitive bidder in performance of the contract. The purchase was thereafter handled in the same manner as if the bid had been originally submitted to the contractor (R. 46).

4. *The King & Boozer Transaction.*—King & Boozer is a partnership consisting of Tom Cobb King and Simon Albert Boozer, and has its principal place of business in Anniston, Alabama. During the period January 1, 1941, to March 31, 1941, covered by the tax assessment, King & Boozer was engaged at Anniston, Alabama, in the business of prefabricating lumber, and in the manufacture or prefabrication of portable houses for sale (R. 42).

King & Boozer submitted a proposal in writing to Dunn & Hodgson to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by Dunn & Hodgson of their contract with the United States (R. 42-43). This proposal was submitted by the contractor to the Constructing Quartermaster at Fort McClellan for his approval, and was approved by him (R. 43). It is stipulated that all of the sales by King & Boozer of tangible personal property which are here involved were made by it in connection with the performance by Dunn & Hodgson of its contract of September 9, 1940, and that the property was sold, paid for, and reimbursement made therefor in the manner here described with respect to a particular purchase made on January 17, 1941 (R. 42-43).

Pursuant to the proposal submitted by King & Boozer, the contractor, on January 16, 1941, prepared and submitted to the Constructing Quartermaster a request for the purchase of certain lumber, and requested the approval by the Constructing Quartermaster of the purchase. The approval of the Constructing Quartermaster was endorsed on the request for purchase (R. 43, 77).

Thereafter, on January 17, 1941, the contractor submitted to King & Boozer at Anniston, Alabama, an order for the lumber. This order was signed by the purchasing agent of the contractor and directed that the materials described in the

order should be shipped to the United States Constructing Quartermaster at Fort McClellan, Alabama, for account of Dunn & Hodgson, f. o. b. Fort McClellan (R. 43, 78-80). The purchase order provided (R. 79):

This order is placed for the benefit of, and is assignable to, the United States Government.

This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

Terms of Payment: as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice.

The purchase order also directed (R. 79-80) that copies of the invoice should be properly filled out by the seller and certified as follows:

I certify that the above bill is correct and just; that payment therefor has not been received; and that * * * supplies furnished under this invoice have been mined or produced in the United States * * * and that State or local sales taxes are not included in the amounts billed.

Upon receipt of the purchase order, King & Boozer at its plant at Anniston loaded the lumber

upon trucks operated by a contract carrier which delivered the lumber to a designated point within Fort McClellan (R. 43). At the time King & Boozer loaded the lumber, the materials were checked and inspected and two reports were made. One report was made to the Constructing Quartermaster and the other to Dunn & Hodgson. Each was signed by an employee of the contractor and by an employee of the United States representing the Constructing Quartermaster and each verified the receipt, inspection and acceptance of the specified quantity of lumber (R. 43-44, 80-81).

On January 18, 1941, King & Boozer delivered to Dunn & Hodgson an original invoice for the materials described in the purchase order of January 17, 1941 (R. 44, 81).

On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor (R. 44, 82). On January 29, 1941, the Constructing Quartermaster approved the invoice for payment (R. 44, 83).

Thereafter, Dunn & Hodgson issued a check to King & Boozer in full payment of the invoice mentioned above, in the amount of \$68.23, being the amount of \$68.40 less one-fourth of one percent discount, which check, upon presentation, was paid in due course (R. 44-45).

On February 3, 1941,¹⁴ the contractor submitted a voucher to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures by it aggregating \$1,991.62, including its expenditure of \$68.23 made to King & Boozer (R. 45, 84-86). Neither the check nor the voucher included any amount for Alabama sales taxes (R. 45). The contractor attached to its voucher the approved request made to the Constructing Quartermaster for the purchase of the lumber, copies of its purchase order to King & Boozer, the two receiving and inspection reports, and the invoice of King & Boozer (R. 45).

The Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on February 5, 1941, it was paid by the Finance Officer at Fort McClellan to the contractor through a United States Government check (R. 45).

King & Boozer has billed Dunn & Hodgson for an amount equal to the taxes assessed against King & Boozer on account of its sales of material used in connection with the performance of the contract with the United States. This amount, which includes the tax on the typical transaction outlined above, has not been paid by the contractor (R. 47).

¹⁴ The date given in the stipulation is March 5, 1941 (R. 45), but the voucher (R. 84) and the related data in the stipulation (R. 45) each show the date given in the text to be correct.

SUMMARY OF ARGUMENT**I**

The Alabama sales tax is imposed upon the buyer. (1) The statute builds its collection and administrative machinery about the seller but makes it a penalty for him to fail to collect the tax from the buyer. (2) The Alabama court has repeatedly held that the tax is on the buyer. (3) This also is the teaching of the analogic decisions of this Court.

II

The United States in its purchases is immune from a sales tax which is imposed upon the buyer.

A. Two aspects of the problem should be noted. (1) It arises because Congress has not exercised its power to determine whether the Government's purchases should be immune from state sales taxes. (2) It must be answered in the light of the self-evident principles that the Government cannot be taxed and that private persons cannot escape taxation unless they can assert the interest of the Government. These principles lead to uncertain results in the field of the tax on the transaction with the Government.

B. Some of the criteria which the Court has announced by which to determine the validity of the tax on the transaction with the Government are unsatisfactory. (1) The conceptual doctrine that a tax on the income is a tax on the source has

been rejected. (2) The rules that a tax may not directly burden or interfere with the Government either are a succinct phrasing of the conclusion reached upon other grounds or refer simply to the economic burden of the tax. (3) The simple rule that no tax is valid if its economic burden falls on the Government can no longer be accepted. Many taxes of unquestioned validity, as the Court has recognized, are ordinarily passed on to the Government by the operation of economic forces and no tax except one actually imposed upon the Government is certain to be borne by it. (4) The rule that no discriminatory tax can be imposed with respect to the Government's transactions is entirely sound, but does not mean that a nondiscriminatory tax can be imposed upon the Government itself.

C. The only satisfactory test of validity, we submit, is that no tax may be imposed upon the Government itself but, if nondiscriminatory, any tax is valid the legal incidence of which is upon a private person. (1) The implications of the Constitution, drawn both from Article VI and from the federated structure of the Constitution, show that the state may not impose a tax on the national government. (2) The decisions of this Court are confusing and contradictory so far as they grant immunity from taxes imposed upon a private person but are wholly uniform so far as they invalidate taxes upon the Government

itself. (3) The test which we advance cannot, of course, be applied with mechanical rigidity but seems both more sound and more precise than any alternative.

D. The immunity from taxes imposed upon the Government includes immunity from a vendee sales tax on the Government's purchases even though collected through a private person. (1) Many decisions have sustained taxes on private persons though collected through an immune instrumentality, and a number of cases have invalidated taxes imposed upon government property though collection was attempted through a private person. The conclusion, that a sales tax imposed on the Government is invalid though collected through a private person, is confirmed by the practical operation of the vendee sales tax. (2) Our analysis would indicate that a vendor sales tax, the legal incidence of which is upon the seller, is valid in the silence of Congress. We cannot, therefore, rely upon the four vendor sales tax cases decided by this Court, which have in effect been overruled by *James v. Dravo Contracting Co.*, 302 U. S. 134. If the contrast between the validity of vendee and of vendor sales taxes should involve any practical anomaly, this is a question for Congress.

E. Several *indicia* of congressional intention show a desire that the Government be immune from a vendee sales tax. (1) Congress, knowing

its power to waive immunity and knowing the Government's exemption from sales taxes, has acquiesced in the procurement practice of the Government and the decisions of this Court. (2) The numerous acts creating government corporations have immunized them from sales taxes. (3) Congress has allowed the imposition of state sales taxes in federal enclaves, but has excepted sales to the United States from this authority. (4) Both the states and the United States are consistently exempted from the federal excises.

III

The Government's immunity from a vendee sales tax is not lost because it makes its purchases through a cost-plus-a-fixed-fee contractor.

A. It is probable that the contractor does not stand in the technical position of an "agent" with respect to all of his functions. But the general provisions of the contract corroborate the evident fact that the materials are purchased by and for the United States, and not the contractor.

B. The cost-plus-a-fixed-fee contractor serves only as a convenient means through which the Government makes its own purchases. (1) This is shown by the contract itself, which specifies the allowable purchases, reserves to the Government a close control over both quality and price, provides that title will pass directly from the seller to the Government, ensures a prompt reimbursement to

the contractor, and permits the Government through direct purchase to supply the material itself if it chooses. (2) The practice of the parties underscores the terms of the contract. Every step taken by the contractor was approved by the Government in advance, including the basic proposal, the specific purchase request, the acceptance of the lumber, and payment of the invoice. After delivery the Government and not the contractor had both title and dominion. (3) The legal relationship of the parties, whether that of agency, employment or simple conduit, was such that the purchases were plainly those of the Government and not those of the contractor.

C. It follows without more that the Government does not lose its immunity from a vendee sales tax when it purchases through a cost-plus contractor. (1) The realities of the transaction show that the contractor differs from a broker or an ordinary employee of the Government in no material respect. (2) A decision that the Government's immunity is lost when it purchases through a cost-plus contractor would introduce serious problems into its important functions. The magnitude and complexity of the current defense program make necessary a wide use of cost-plus-a-fixed-fee contracts. If state vendee sales and use taxes were collected because the Government makes its purchases in this manner, an unanticipated tax burden of about \$28,000,000 would have to be met

with respect to the contracts already let. (3) Whatever the validity of the actual decisions sustaining a tax immunity claimed by a private person, their premise is as sound today as at the day of their decision: the Government itself may not be taxed even though the formal taxpayer is a private person. (4) The administrative exemptions from federal excises and the rulings of the Comptroller General regulating the purchase requirements of the cost-plus contractor have each recognized that his purchases are in reality those of the United States. The rulings of some but not all state tax officials are to the same effect.

D. There has been no waiver by the Government of its immunity. (1) The contract, in promising reimbursement for "applicable" state taxes leaves open the question of what taxes are applicable. (2) The Senate, in the Naval Appropriation Act for 1941, added a proviso that the cost-plus contractors should be agents of the United States and their purchases immune from state taxation. The House rejected this, with the concurrence of the Senate, but on grounds irrelevant here. (3) Similarly, the Senate in the Act of June 15, 1940, added a clause broadly declaring the cost-plus contractors to be agents of the Government and the House, with concurrence of the Senate, rejected it on unspecified grounds. But the reasons for this rejection could be no more relevant here than those

advanced in rejecting the amendment dealing specifically with tax immunity.

ARGUMENT

The court below held that the Alabama sales tax could not constitutionally be applied to the purchases made by the United States through its cost-plus-a-fixed-fee contractor. It ruled: the state sales tax is imposed on the purchaser (R. 148-149); the sale of goods to the United States may not be taxed (R. 149-150); the purchase of goods through the cost-plus contractor results in the direct incidence of the tax on the Government (R. 151); the cost-plus contractor in purchasing goods is an instrumentality or agent of the United States (R. 151-152); and there has been no waiver by the United States of its immunity (R. 152-154).

The conclusion reached by the court below is correct. We shall demonstrate in detail that: (I) The Alabama sales tax is imposed upon the purchaser; (II) the United States in making its purchases is immune from a sales tax laid upon the buyer; and (III) the immunity of the United States does not vanish because it makes its purchases through a cost-plus-a-fixed-fee contractor.¹

¹ The Government also urged in the lower courts that the State lacked territorial jurisdiction to impose the tax. (R. 4, 15, 30, 137.) The contention was rejected by the trial court (R. 132-134) and was not considered by the Supreme Court of the State (R. 147, 154). The Government would doubtless have power to raise this question in this Court. See *McGold-*

I

THE ALABAMA SALES TAX IS IMPOSED UPON THE
PURCHASER

1. *The Statute.*—The sales tax is imposed by Alabama Laws of 1939, Act No. 18. Section II of that Act, *infra*, pp. 121–122, provides:

There is hereby levied * * * a privilege or license tax * * * on account of the business activities and in the amount * * * as follows: (a) Upon every person, firm, or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever * * * an amount equal to two percent (2%) of the gross proceeds of sales of the business * * *.

The tax, then, is a privilege tax on the business of selling at retail and is measured by the gross proceeds of sales. The statute denominates the seller as the taxpayer, and builds its tax-collection and refund procedure about the seller's function

rick v. Compagnie Generale, 309 U. S. 430, 434–435; cf. *Langnes v. Green*, 282 U. S. 531, 536–537. However, we do not press this objection here because the remaining issues are the more important and because the construction of the state cession statute (Alabama Laws of 1935, Act No. 344) is a relevant consideration (see *Mason Co. v. Tax Commission*, 302 U. S. 186, 205–207). Under the circumstances, it would seem appropriate that this Court, if it should reverse the court below, should remand the case for consideration of the further question of territorial jurisdiction. Cf. *Equitable Co. v. Halsey, Stuart & Co.*, 312 U. S. 410, 426.

as the one who is the immediate or proximate taxpayer to the State.² If the statute stopped here, it would concededly be a vendor sales tax and would not be imposed by law on the purchaser. But other provisions make plain that the seller's function is in truth no more than that of a tax collector and that the legal incidence of the tax is really upon the buyer.

Section XXVI of the Act, *infra*, pp. 129-130, requires that the seller in every case collect the full amount of the tax from the purchaser. It provides:

It shall be unlawful for any person
 * * * to fail or refuse to add to the
 sales price and collect from the purchaser
 the amount due by the taxpayer on account
 of said tax provided herein, or * * *
 refund or offer to refund all or any part of

² Copious extracts from the statute are reprinted in Appendix A, *infra*, pp. 121-131. The seller must obtain a license, conditioned upon payment of the taxes, from the Department of Revenue. Sec. IV. The taxes are payable monthly, and an annual report is also required. Secs. VI, VIII. The seller must keep records. Sec. IX. Failure to make reports or to give the Commissioner access to records is punished. Secs. XI, XII. The Department is to refund overpayments to the seller, and to collect deficiencies and penalties in the case of underpayment as shown by the return. Sec. XIII. The Commissioner may also assess deficiencies against the seller based upon his books and records; notice is given the seller, who has the right to an administrative appeal and to judicial review. Secs. XVI, XVII XVIII, XX. The tax is a lien upon the property of the seller. Sec. XIX. He may be enjoined from continuing in business after violation of the Act. Sec. XXVIII.

the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII, *infra*, p. 130, provides a penalty of fine and imprisonment for violation of the provisions of section XXVI.

Under these provisions the purchaser and not the seller is the one upon whom the tax is imposed. The Alabama legislature did not trust to the uncertain operation of economic forces to shift the tax to the consumer. It did not leave the seller free to meet his sales tax obligation as he chose. It did not even rest content with a hortatory encouragement to the seller to pass the tax on to his buyer. It imposed this duty on him by law, and made it a penal offense for the seller to absorb the tax or, indeed, even to advertise that he would do so. Accordingly, it is plain enough that the tax is by law to be paid by the purchaser, and that the seller's only function is that of tax collector for the state.

This conclusion is confirmed by other provisions of the statute. Section VII, *infra*, p. 125, exempts the seller from taxation upon credit sales until he has actually been paid; the provision is designed to eliminate tax liability when the seller cannot in fact collect from the buyer. Section XXXVI, *infra*, pp. 130-131, authorizes the Governor and the Department of Revenue to allow a 3 percent discount on taxes paid by the seller to the

state;³ the provision is evidently intended to permit recompense to the seller of the cost of collecting the tax from the buyer. Cf. *Colorado Bank v. Bedford*, 310 U. S. 41, 53. Section XXXVII, *infra*, p. 131, authorizes the Department to issue tax tokens in one and five mill denominations,⁴ in order to permit the purchaser to meet the exact amount of the tax to be collected from him.

Section V, *infra*, pp. 122-124, contains an extensive list of exempt transactions. These exemptions include sales to the State of Alabama, its counties and its municipalities. Section V (b).⁵ And section V (a), *infra*, p. 123, exempts sales "which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state." The provision does not serve to accord the United States a statutory exemption, but does reflect the legislative recognition that the sales tax, collected from the purchaser, is inapplicable under the principles of intergovernmental tax immunity to an undefined class of sales.

³ The discount was directed by executive order of February 21, 1939, and a regulation to that end adopted by the Department of Revenue on the same day.

⁴ The tokens were in fact issued. See *Long v. Roberts & Son*, 234 Ala. 570, 576 (1937); *Tanner v. State*, 190 So. 292, 294 (Ala. Ct. App., 1939).

⁵ Section V, *infra*, pp. 122-124, also exempts the sale of: school textbooks (d), fertilizer (g), seeds (h), containers for agricultural products (i), newspapers and religious publications (j), and school lunches (o).

The statute, in short, calls the seller the taxpayer but places the legal incidence of the tax inescapably upon the purchaser. It is immaterial, as the court below recognized (R. 149), what terminology the statute uses; for purposes of rights under the federal constitution and statutes, the courts must look not to the phraseology but to the practical operation of the state statute. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443-444; *Lawrence v. State Tax Comm.*, 286 U. S. 276, 280; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387. Here the statute in terms places on the seller the legal duty of collecting the tax from the purchaser. It contains provisions, relating both to the seller's liability and to the collection machinery, which demonstrate from the face of the statute that a tax on the purchaser and not on the seller was intended.

2. *The Alabama Decisions.*—The decisions of the Supreme Court of Alabama unequivocally hold that the sales tax is laid upon the purchaser and not the seller.

In *Doby v. State Tax Commission*, 234 Ala. 150 (1937),* the court said, "The retailer is the 'taxpayer,' the person liable to the state for the tax"

*The Alabama cases prior to the decision in this case concerned the basically similar sales tax imposed by Alabama Laws of 1937, Act No. 126. As shown by the decision in this case (R. 149), the result is the same under the 1939 Act.

(p. 153), but went on to make plain that the legal incidence was upon the buyer. It held (p. 154):

* * * The taxpayer, the seller, is charged with the mandatory duty to add the amount of the tax to his sales price, and to collect it from the purchaser along with the sales price. * * * The law intervenes and adds the amount of the sales tax which the seller must pay to the state to the price he must collect from the purchaser. It is collected to reimburse the seller for what he must pay the state. The ultimate burden of the tax is thus passed on to the customer. * * *

* * * So, the legal duty of the retailer, the taxpayer, is to pay the tax and also to collect a like amount from the purchaser. It is not a question of whether he should pay the tax, or, in the alternative, collect the tax for the state.

In a number of subsequent cases the Alabama court has unequivocally ruled that the sales tax is one on the consumer and not a tax on the seller. *Lone Star Cement Corporation v. State Tax Commission*, 234 Ala. 465, 469 (1937); *State Tax Commission v. Hopkins*, 234 Ala. 556, 558 (1937); *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360, 364 (1939); *McPhillips Mfg. Co. v. Curry*, 2 So. (2d) 600, 605 (Ala., 1941). And the conviction of a seller who failed to collect the amount of the tax from his buyer was affirmed in *Tanner v. State*, 190 So. 292 (Ala. Ct. App., 1939).

In *Long v. Roberts & Son* 234 Ala. 570 (1937), the court held⁷ that sales to counties were tax exempt⁸ because the tax was in fact imposed upon the purchaser. It answered the "ingenious argument" of the tax commission, that the tax was imposed upon the retailer, not the purchaser, as follows (pp. 575, 576):

* * * we are dealing with a broad principle relating to governmental functions, and should look through form to substance. And when this is done, the act clearly demonstrates that the burden of the tax is expressly placed upon the consumer, and it is this burden with which the broad principle of exemption has to deal.

* * * * *

While theoretically the tax is on the seller, yet in actuality the burden of the tax falls on the consumer. * * *

* * * * *

* * * While strictly speaking, and from a technical standpoint, it is a tax on the seller, yet in practice and under the express language of the act, the consumer must pay the sum—he it is who is to make the tribute. To hold, therefore, that the general principle of exemption is inappli-

⁷ The main opinion represented on this point the views of all the court (234 Ala. at 572).

⁸ The 1937 Act expressly exempted sales to the State and to municipalities and was silent as to counties (234 Ala. at 576).

cable to governmental functions because technically the seller is due to collect and pay the tax to the tax commission, is to sacrifice substance to form, when, as here, the county, out of its treasury, must actually pay the amount of the tax in addition to the selling price.

Finally, the Alabama court ruled in this case (R. 148-149):

The nature of the tax is not determined by the name given to it, or by the use of some particular form of words, but by the substance and realistic impact of the tax; * * *. The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax.

The Alabama court, then, has ruled with frequency and with emphasis that the state sales tax is imposed upon the purchaser, not the seller.⁹ These decisions of the Alabama court are entitled to great weight in the analysis of the Alabama sales

⁹ The executive departments of the State have similarly ruled. Sales Tax Regulation No. 13 exempts purchases made by Federal Surplus Commodities Corporation food stamps because the purchase by the relief client is in effect that of the Government. The Attorney General of the State held sales to counties exempt under the 1937 Act because of "the clear legislative intention" that the tax should be "on the consumer rather than on the seller." VII Quarterly Rpt. of A. G. of Ala. 77. He has also ruled that a considerable variety of purchases are exempt from taxation because the purchaser upon whom the tax is laid is exempt. See VII *id.* 17, 77, 96, 109; VIII *id.* 310.

tax statute in order to determine who is the real taxpayer. *Colorado Bank v. Bedford*, 310 U. S. 41, 52.¹⁰

3. *The Decisions of this Court.*—In two cases this Court has ruled that the somewhat comparable taxes of New York City and of Colorado were taxes on the buyer and not on the seller. *McGoldrick v. Berwind-White Coal Co.*, 309 U. S. 33, 43; *Colorado Bank v. Bedford*, 310 U. S. 41, 51–52. The details of those cases are discussed in our brief in *Federal Land Bank v. Bismarck Lumber Co.*, No. 76, this Term, pp. 13–14, and need not be repeated here.¹¹

The terms, then, of the Alabama sales tax act, the numerous decisions of the Supreme Court of Ala-

¹⁰ Whether the United States acting through its cost-plus contractor is immune from the Alabama sales tax is, of course, a federal question. If, as we urge at a later point, this federal issue turns upon the legal incidence of the tax, this Court is not controlled by the characterizations or conclusions of the state court. See *Heiner v. Mellon*, 304 U. S. 271, 279; *Lyeth v. Hoey*, 305 U. S. 188, 193–194; *Morgan v. Commissioner*, 309 U. S. 78, 81; *United States v. Pelzer*, 312 U. S. 399. But the decisions of the state court are entitled to much weight in the inquiry as to how the state statute actually operates, and upon whom the tax burden was intended to be placed by the state legislature.

¹¹ In that brief we argue that the North Dakota sales tax also is imposed upon the buyer not the seller. The North Dakota and the Alabama sales taxes are basically similar. They differ significantly only in the following respects: The North Dakota tax makes the tax a debt from the buyer to the seller (sec. 6) while the Alabama tax makes it a penal offense to fail to collect the tax from the buyer (secs. XXVI, XXVII).

bama, and the analogic decisions of this Court alike require the conclusion that the sales tax is imposed upon the buyer and not on the seller, who acts simply as the collecting agent for the state. While the State does not in terms concede this proposition, it makes no argument to the contrary (Br. 33-34).

II

THE UNITED STATES IN ITS PURCHASES IS IMMUNE FROM A SALES TAX IMPOSED UPON THE BUYER

The court below held "There is no doubt but that a sale of material to the Government to be used in promoting its governmental enterprises cannot be made the basis of a state sales tax" (R. 149). The state did not deny this proposition in that court and does not contest it here (Br. 58, 62). However, we think that the proposition so broadly stated is subject to considerable doubt, and that the march of decisions in the field of tax immunity litigation requires a rather careful exposition to demonstrate our narrower contention that the United States in making its purchases cannot be subjected to a state sales tax which as a matter of law is laid upon the purchaser.

A. THE PROBLEM

1. *The Unexercised Power of Congress.* The question here is one of constitutional immunity from state taxation. By this we mean that Congress has not undertaken to resolve the question of

immunity or liability, and it must be answered solely in terms of the inferences and implications to be drawn from the Constitution itself.

If Congress had legislated, the issue would be far simpler, if indeed it reached the stage of litigation at all. For it almost indisputably lies within the power of Congress to determine whether or not federal activities should receive the protection of immunity from state sales taxes upon purchases made by the United States and its instrumentalities. Congress has always been recognized as possessing the power to waive the immunity from state taxation and transactions which would otherwise attach to federal instrumentalities and transactions.¹ And it may no longer be doubted that Congress within broad limits has a corresponding power to exempt from state taxation transactions of the United States and its instrumentalities which might otherwise be taxable. *Smith v. Kansas City Title Co.*, 255 U. S. 180; *Federal Land Bank v. Crosland*, 261 U. S. 374; *Pittman v. Home Owners' Corp.*, 308 U. S. 21.² Our argument on this score is developed in

¹ *Van Allen v. The Assessors*, 3 Wall. 573, 583, 585; *People v. Weaver*, 100 U. S. 539, 543; *Mercantile Bank v. New York*, 121 U. S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 668; *Mid-Northern Oil Co. v. Montana*, 268 U. S. 45; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 525-526; *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209; *British-American Co. v. Board*, 299 U. S. 159.

² See, also, *Bank v. Supervisors*, 7 Wall. 26, 30-31; *Choate v. Trapp*, 224 U. S. 665; *Smith v. Kansas City Title Co.*, 255

summary form in our brief in *Federal Land Bank v. Bismarck Lumber Co.*, No. 76, this Term, pp. 44-52, and need not be elaborated here.

We are faced, then, with a constitutional question simply because Congress has not exercised its power to settle the issue. It may be conceded that, since the answer must ultimately be shaped in terms of the economic, fiscal and political relations between the nation and the states, the decision would be more fittingly undertaken by Congress than by this Court. But Congress has not acted and, pending the congressional decision, the issue is of necessity committed to the outcome of adversary proceedings in the courts.

2. *The Basic Principle.*—Tax immunity litigation has in the large taken place in the uncertain terrain lying between two quite plain and established points. On the one hand, it has never been questioned that the United States itself may not be forced to answer to the state tax collector. On the other hand, it has never been doubted that a tax laid upon a private person alone may not be escaped simply because he deals with the Government, and that some governmental interest must be found if the taxpayer is to be immune.

U. S. 180, 212-213; *Federal Land Bank v. Crosland*, 261 U. S. 374; *Lawrence v. Shaw*, 300 U. S. 245; *Pittman v. Home Owners' Corp.*, 308 U. S. 21, 32-33; see Justices Brandeis and Stone, concurring in *Miller v. Milwaukee*, 272 U. S. 713, 716.

As we demonstrate in detail below (pp. 39-59), we think this simple contrast between a tax which must be paid by the Government and one which must be paid by a private person is both the easiest and the soundest criterion by which to judge a claim for tax immunity. It is sufficient here to note that the Court has at all times accepted the contrast as valid and has found difficulty only in one aspect of its application.

That difficulty has been in regard to the taxes which are imposed with respect to the transaction between the Government and a private person. The Court has recognized that any tax upon a transaction will *affect* both parties. This recognition, at least until recent years, has forced the Court to attempt a distinction between various transaction taxes according to the immediacy of their effect upon the Government. That task has been notoriously difficult. We think that it should be abandoned, and that in the silence of Congress immunity should turn upon the simpler and more satisfactory test of whether the tax is imposed upon the Government or upon a private person. The succeeding sections of this point seek to establish this thesis and to apply that test to the sales tax upon Government purchases.

B. THE CRITERIA OF IMMUNITY FROM TAX ON THE GOVERNMENT TRANSACTION

The Court has in the large adhered to some six general tests by which to distinguish the good tax

from the bad tax as applied to the transaction between the Government and a private person.' These criteria are not mutually exclusive categories, and doubtless reflect more a difference of words than of thought. But, for such weight as they may have, these general tests may be classified as follows: (1) Whether or not a burden, or whether a direct or an indirect burden, upon the Government. (2) Whether or not an interference with the Government's functions. (3) Whether or not a tax upon the governmental source of the payment. (4) Whether or not the

* Many other characterizations of challenged taxes have been used by the Court, but none seems to have been advanced as a means through which to distinguish the valid from the invalid tax. These adjectival categories, with illustrative citations, include: (1) *Bad taxes*: Those which are a threat to the independence of the state or the nation. *The Banks v. The Mayor*, 7 Wall. 16, 25; *The Collector v. Day*, 11 Wall. 113, 124-126; *Helvering v. Powers*, 293 U. S. 214, 224-225. Those which are derogatory to the dignity of the United States. *California v. Pacific Railroad Co.*, 127 U. S. 1, 41; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 628. Those which involve the power to destroy. *McCulloch v. Maryland*, 4 Wheat. 316, 427, 430-431; *The Collector v. Day*, 11 Wall. 113, 127-128; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 212-213; *Gillespie v. Oklahoma*, 257 U. S. 501, 505. (2) *Good taxes*: Those which are necessary to maintain tax sources. *South Carolina v. United States*, 199 U. S. 437, 455, 463; *Willcuts v. Bunn*, 282 U. S. 216, 225; *Helvering v. Producers Corp.*, 303 U. S. 376, 384. Those which serve to repay the Government for the general benefits given the citizen. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548; *Helvering v. Gerhardt*, 304 U. S. 406, 420-421.

economic burden of the tax is borne by the Government. (5) Whether or not the tax is nondiscriminatory. (6) Whether the tax is in law imposed upon the Government or the private person. We think the first four criteria are unsound and have been rejected by the Court and that acceptance of the fifth and sixth is required both by principle and by existing authority.

1. *A Tax on the Source*.—The Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 555–583, 158 U. S. 601, 618, held the federal income tax invalid as applied to the interest received on municipal bonds because a tax on the income was equivalent to one on the source, and the federal government could not tax the municipal borrowing power or the securities through which that power was exercised. The same analysis has been applied in several subsequent cases.⁴ The formula has been unmistakably rejected, both in terms and in practical results. *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480–481.⁵

⁴ *Gillespie v. Oklahoma*, 257 U. S. 501, 506; *Northwestern Insurance Co. v. Wisconsin*, 275 U. S. 136, 140; *Long v. Rockwood*, 277 U. S. 142, 147; *Burnet v. Coronado Oil Co.*, 285 U. S. 393, 400–401. Each of these cases, except the *Northwestern Insurance* case has expressly been overruled.

⁵ The formula would have required the invalidation of the taxes sustained in the *O'Keefe* case and in *Metcalfe & Eddy v. Mitchell*, 269 U. S. 514; *Fox Film Corp. v. Doyal*, 286 U. S. 123; *James v. Dravo Contracting Co.*, 302 U. S. 134, and *Helvering v. Producers Corp.*, 303 U. S. 376. Prior to its definitive repudiation in the *O'Keefe* case, it was discredited

2. *Whether or Not a Burden or an Interference.*—The tax in *Panhandle Oil Co. v. Knox*, 277 U. S. 218, 222, was condemned as one the necessary effect of which was “directly to retard, impede and burden the exercise by the United States of its constitutional powers.” Since that decision, the formula has been used with a fair degree of frequency, generally to sustain a challenged tax because it occasioned but an indirect or remote burden upon the operations of government.* A closely related criterion is whether or not the tax interferes with the functions of government. In a dozen or more cases the Court has sustained a tax as presenting no substantial interference with the Government’s functions,[†] and in a number of

by the opinions in *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 813–814, and *Hale v. State Board*, 302 U. S. 95, 106–108.

* *Educational Films Corp. v. Ward*, 282 U. S. 379, 392; *Alward v. Johnson*, 282 U. S. 309, 514; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279; *Indian Territory Oil Co. v. Board*, 288 U. S. 325, 328; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 514; *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, 472; *Taber v. Indian Territory Co.*, 300 U. S. 1, 3; Cardozo J., dissenting in *Texas Co. v. Graves*, 298 U. S. 393, 406; Roberts, J., dissenting in *James v. Dravo Contracting Co.*, 302 U. S. 134, 164.

[†] *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Railroad Co. v. Peniston*, 18 Wall. 5, 30–31, 36–37; *Home Insurance Co. v. New York*, 134 U. S. 594, 598; *Central Pacific Railroad v. California*, 162 U. S. 91, 126; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, 323; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525; *Willcutts v. Bynn*, 282 U. S. 216, 226; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128; *Indian*

other cases has declared a tax invalid as a real and substantial interference with the functions of Government.*

None would question the validity of either principle so far as it condemns a tax which is a substantial interference with or a direct burden upon the performance of the functions of the Government. The difficulty lies rather in the use of the principles as a guide to the decision of particular cases. It is very hard to tell what is meant by the statement that a tax interferes with or burdens the Government's transaction. It plainly does not forbid the entry into the transaction or regulate its terms or performance. Ordinarily, the only practical interference would seem to be the discouragement found in the economic burden of the tax. So each criterion seems to find its value either as a succinct phrasing of the conclusion, reached on other and unexpressed grounds, or else to refer to the economic burden of the tax.

Territory Oil Co. v. Board, 288 U. S. 325, 328; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 516; *Taber v. Indian Territory Co.*, 300 U. S. 1, 3; *Helvering v. Producers Corp.*, 308 U. S. 376, 384-387; *Helvering v. Gerhardt*, 304 U. S. 405, 424; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480-481, 484.

* *Dobbins v. Erie County*, 16 Pet. 435, 449; *The Collector v. Day*, 11 Wall. 113, 127; *Home Savings Bank v. Des Moines*, 205 U. S. 503, 513; *Farmers Bank v. Minnesota*, 232 U. S. 516, 520, 526; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 624; *Missouri v. Gehner*, 281 U. S. 313, 321.

3. *The Economic Burden of the Tax*.—A simple and intelligible reason for invalidating a tax laid upon a private person is that as a practical matter it will increase the costs or reduce the revenues of the government with which he deals. But this reason has been advanced in only three of the opinions declaring an immunity from taxation.⁹ Indeed, the Court has firmly stated that "The question here is one of power and not of economics." *Home Savings Bank v. Des Moines*, 205 U. S. 503, 519.

One supposes that an economic analysis or intuition lies back of every decision that a private person is immune from taxation because he deals with the Government.¹⁰ For it is only through a shifting of the economic incidence of the tax burden to the Government that it would in any way be

⁹ *Weston v. City Council of Charleston*, 2 Pet. 449, 468; *Dobbins v. Erie County*, 16 Pet. 435, 448; *Gillespie v. Oklahoma*, 257 U. S. 501, 506. Dissenting opinions have, however, occasionally referred to the uncertainty that the tax declared invalid by the majority would have resulted in increasing the costs or lowering the revenues of the Government. *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 615, 618; *National Life Ins. Co. v. United States*, 277 U. S. 508, 528; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 637; *Missouri v. Gehner*, 281 U. S. 313, 331; *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581; *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 127; *Graves v. Texas Co.*, 298 U. S. 393, 406.

¹⁰ See the opinion in *Graves v. Texas Co.*, 298 U. S. 393, 395, where the Court estimates the additional cost of gasoline to the United States if the tax were sustained, and assumes that this represents the "burden" on the Government.

affected by a tax laid upon another. Yet the difficulty with the analysis is that it inevitably proves too much. When the Government buys an article, or receives goods and services under contract, it must in the normal course pay all of the costs required for the finished product. These costs include taxes of all forms: real and personal property taxes, franchise taxes, and sales and excise taxes upon goods bought by the seller or contractor. There is no economic reason why these taxes should be valid and the tax upon the final transaction, sale or delivery to the Government, invalid. True, it is probable that the final tax would somewhat more certainly be shifted to the Government than those anterior in point of time. But even the final tax is by no means certain to be shifted. See Mr. Justice Stone, dissenting in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581.¹¹ And the earlier taxes could easily be isolated through accounting procedures and by contract be made specifically reimbursable by the Government; yet none would suppose that the resulting certainty of tax incidence upon the Government would invalidate taxes otherwise unobjectionable.

¹¹ The A. A. A. processing tax upon hogs affords an interesting illustration. That tax was shifted backward, rather than forward, through the payment of reduced prices for hogs. *An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act*, prepared by Bureau of Agricultural Economics, Department of Agriculture, and published by Bureau of Internal Revenue, Treasury Department (G. P. O., 1937).

For these reasons, the economic test is illusory and incapable of consistent application. More basically, it must be remembered that in the silence of Congress the question is one of the implications to be drawn from the Constitution and its structure. The Constitution, easily enough, may be viewed as immunizing one Government from taxes to be paid to another. But we cannot believe that it enacts an economic calculus or contains inferences so nicely discriminating as to invalidate a sales tax laid upon the Government's seller and to permit a gross receipts tax imposed upon the Government's independent contractor.

Perhaps in recognition of these considerations, the Court in its recent opinions seems to us to have rejected the economic burden as a criterion of validity or invalidity. That rejection has taken two forms: (a) an outright refusal to accept increased cost as a reason for invalidation and (b) an analysis which indicates that the economic burden of the challenged tax on the Government is speculative, and so indicates that the economic incidence of any tax must always be speculative. Each of the recent opinions dealing with the question has adopted both approaches.

(a) In *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, the Court, doubtless reflecting the Government's concession that the gross receipts tax on its contractor would be shifted to it, said

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax."¹² In *Helvering v. Gerhardt*, 304 U. S. 405, the Court listed (pp. 418-419) a dozen cases where "taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state," and said (p. 422):

The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

And, in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, the Court at several points noted that it was not enough, to invalidate a tax, "that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other" (pp. 483, 484, 487).

(b) The Court has emphasized in each of these cases that any shift to the Government of the economic burden of the tax was speculative and

¹² Similarly, in *Helvering v. Producers Corp.*, 303 U. S. 376, the Court, in sustaining a tax upon the net income of a government lessee, recognized that one of the two grounds of the decision in the *Gillespie* case was the fact that the government might be forced to accept lowered rentals for its wards, but nonetheless overruled that decision.

uncertain. *Dravo*, 302 U. S. at 159; *Gerhardt*, 304 U. S. at 416, 420, 421; *O'Keefe*, 306 U. S. at 484-485, 486. But it by no means follows that the opinions imply that a tax on a private person may ever be challenged because of its economic burden on the Government. In the first place, as just noted, the opinions expressly state that shifting of the economic burden does not invalidate the tax. In the second place, the economists can point to no tax which more certainly will be shifted than a sales tax or a gross receipts tax.¹² Chief Justice Hughes, in the *Dravo* case, was concerned with a gross receipts tax, and Mr. Justice Stone, in both the *Gerhardt* and *O'Keefe* cases cited his dissent in the *Indian Motorcycle* case, involving a sales tax, for the proposition that tax-shifting is inevitably uncertain (304 U. S. at 421; 306 U. S. at 484). Accordingly, the opinions in these cases mean in truth that *any* tax imposed upon and paid by a private person can have no more than a speculative or uncertain effect upon the Government with which he deals.

¹² See, e. g., *Martin*, *Distribution of the Consumption Tax-load*, 7 *Law and Contemp. Prob.* 445, 446, and authorities cited; *Seligman*, *Shifting and Incidence of Taxation* (5th ed., 1927), pp. 339-341, 372-373; *Plehn*, *Public Finance* (1931), pp. 311-312, 327; *Buehler*, *Public Finance* (1940), p. 363; *Bastable*, *Public Finance* (3d ed.), pp. 372, 377; *Lutz*, *Public Finance* (1936), pp. 403-404; *Brown*, *The Economics of Taxation*, pp. 59, 95-96; *Shoup*, *The Sales Tax in France* (1930), pp. 322-327; *Bulletin*, *National Tax Association* (1929-1930), p. 260.

It follows, from either approach to the recent decisions, that the existence or nonexistence of an economic burden upon the Government can no longer be accepted as the touchstone of validity or invalidity of a tax imposed upon a private person.

4. *Discrimination As A Measure of Invalidity.*—In its first tax-immunity opinions the Court ignored the highly discriminatory nature of the taxes under consideration. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738. In a subsequent opinion it expressly rejected the argument that a nondiscriminatory state property tax might be applied to federal securities. *Bank of Commerce v. New York City*, 2 Black 620. But in recent years the Court in sustaining a challenged tax has with increasing frequency noted¹⁴ or emphasized¹⁵ that the tax was nondiscriminatory. And the only cases to reach this Court since *Osborn v. United*

¹⁴ *Denman v. Slayton*, 282 U. S. 514, 520; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 282; *Educational Films Corp. v. Ward*, 282 U. S. 379, 392; *Fox Film Corp. v. Doyal*, 286 U. S. 123, 131; *Indian Territory Oil Co. v. Board*, 288 U. S. 325, 327; *Burnet v. A. T. Jergins Trust*, 288 U. S. 508, 514; *Federal Compress Co. v. McLean*, 291 U. S. 17, 23; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 157.

¹⁵ *Willcuts v. Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Taber v. Indian Territory Co.*, 300 U. S. 1, 3, 4, 5; *Helvering v. Producers Corp.*, 303 U. S. 376, 384, 385, 386, 387; *Helvering v. Gerhardt*, 304 U. S. 405, 413, 420; *Pacific Co. v. Johnson*, 285 U. S. 480, 493, 494, 495, 496; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480, 484, 485, 487.

States Bank which were thought to have involved a discriminatory tax were decided upon this ground. *Miller v. Milwaukee*, 272 U. S. 713; *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 120, 123.

None would question that a tax which discriminated against the Government or those who deal with it should be declared invalid. For a discriminatory tax, singling out a governmental function to bear abnormal and unfriendly burdens, does in truth involve the power to destroy. Cf. *McCulloch v. Maryland*, 4 Wheat. 316; *Veazie Bank v. Fenno*, 8 Wall. 533. Accordingly, the principle that a tax, so long as it has any effect upon the Government's operations, must be non-discriminatory to be upheld, is one of pervading application and importance.

The test, however, is not universal. We think that any nondiscriminatory tax which is imposed upon and paid by a private person is valid. But it does not follow that a tax which is imposed upon and paid by the Government is valid simply because nondiscriminatory. Instead, we urge that any tax is invalid when its legal incidence is upon the Government. This proposition we seek to establish in the next section.

O. THE UNITED STATES IS IMMUNE FROM ANY TAX LAID UPON AND PAID BY THE GOVERNMENT ITSELF

We have attempted to show that no satisfactory or currently accepted criterion has been evolved to

mark off the valid from the invalid taxes imposed upon and paid by the private person who deals with the Government. We think in truth that there can be none, except only the requirement that the tax must be nondiscriminatory to be valid, and that with this qualification no tax imposed upon and paid by a private person may be challenged in the silence of Congress as an infringement of the Government's immunity. We urge, in short, the far simpler and far more satisfactory criterion of immunity, whether the tax is imposed upon and paid by the Government or by the private person.

1. *The Basis of Constitutional Immunity from Taxation.*—The doctrine that the sovereign is exempt from taxation is one of ancient standing in England. The principle has been explained in terms of royal prerogative. See Kenyon, C. J. in *Rex v. Cook*, 3 T. R. 519, 522 (1790); *Coomber v. Justices of Berks*, 9 A. C. 61 (1883). This doctrine, except for a historical tendency to adopt the institutions of the mother country, is therefore unrelated to the intergovernmental problems of the United States.

When Congress has not acted, immunity from taxation must in America be found in the Constitution itself. So far as concerns state taxation challenged as invading a federal immunity, the answer must turn upon the words and in-

ferences of Article VI or upon the general structure of the Constitution.

Article VI provides that the Constitution and the laws and treaties of the United States "shall be the supreme law of the land" and the state judges should be bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." The vigorous reach of the opinions of Chief Justice Marshall, announcing broadly that Article VI protected every federal function from all varieties of state taxation, has long since been abandoned.¹⁶ But his premise remains, as self-evident and as incontestible today as in 1819. Under Article VI the Constitution and the laws of the United States are the supreme law of the land. The Government of the United States, created by the Constitution and shaped by the laws of the United States, is included within that supremacy. It is, therefore, not included within the sovereign taxing powers of the states, for the states can tax only "subjects over which the sovereign power of a state extends." *McCulloch v. Maryland*, 4 Wheat. 316, 429, 430-436.

Consideration of the implications of the federated system created by the Constitution invokes

¹⁶ The brief for the United States in *Graves v. New York ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 84-85, lists 50 cases in which this Court has sustained taxes, which, if pressed to discriminatory or oppressive limits, would be likely to destroy or cripple the governmental function.

the same analysis. The enumerated powers granted to Congress are both by logical necessity and by express provision made supreme over state laws. The remaining powers of the states, by definition unqualified and unaffected by the powers conferred upon the central government, are those of full sovereignty and are untouched by the federal powers. It would be consistent neither with mutual independence nor with mutual sovereignty to subject either the state or the nation to the tax collection machinery of the other.¹⁷

Taxation of an independent sovereign is at best a philosophic anomaly. A tax is a compulsory exaction by the sovereign from its subject.¹⁸ Whatever the view one accepts of the nature of government it is plain that there is no philosophic basis for the power by unilateral action to wrest taxes from another sovereign government.

In recent decades the philosophic foundations of the immunity of the Government have received practical content from the view that the Government should not be saddled with the economic cost

¹⁷ In the case of a federal tax upon a state, the implications of Article VI and those of the constitutional structure point in different directions. That problem, probably of more philosophic than practical difficulty, need not be faced here.

¹⁸ See *Lawrence v. State Tax Comm.*, 286 U. S. 276, 279; *United States v. LaFranca*, 282 U. S. 568, 572; *Houck v. Little River District*, 239 U. S. 254, 265; *Florida Central R. Co. v. Reynolds*, 183 U. S. 471, 475; *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 197-198.

of state taxation. See, e. g., *Graves v. Texas Co.*, 298 U. S. 393. While unsatisfactory as a criterion of validity (*supra*, pp. 44-49) the economic aspect of intergovernmental tax immunity has lent solidity to a rule otherwise wholly conceptual in nature.

The Canadian and Australian rules, it may be noted, seem to follow the same pattern of immunizing the Government itself,¹⁹ and it is probable that the rule would include immunity at least from a vendee sales tax.²⁰

¹⁹ The oscillating course of decision in these federations with respect to the tax on the officer's salary is not dissimilar to that of our own, and is summarized in detail in our brief in *Graves v. New York ex rel. O'Keefe*, No. 478, Oct. Term, 1938, pp. 106-121.

²⁰ Both the Canadian and the Australian constitutions exempt the property of the central and local governments from taxation by the other government. British North America Act, 1867, 30-31 Vict., c. 3, sec. 125; Commonwealth of Australia Constitution Act, 1900, 63-64 Vict., c. 12, sec. 114. They do not, however, contain express prohibitions against the imposition of sales taxes by one government on transactions of the other.

In Canada, the Dominion but not the Provinces can levy indirect taxation. British North America Act, secs. 91 (3), 92 (2); *Rea v. Miller Court & Co.* [1930], 3 D. L. R. 745 (S. Ct. B. C.); *The King v. William Neilson, Ltd.* [1934], Ex. C. R. 124 (upholding and giving effect to Dominion sales taxes). Provincial sales and gross receipts taxes have been held invalid where indirect in the sense that the burden was likely to be shifted intact from the place of legal incidence. *Attorney-General for Manitoba v. Attorney-General for Canada* [1925], A. C. 561 (P. C.); *Attorney-General for British Columbia v. Canadian Pacific Ry.* [1927], A. C. 934 (P. C.); *Rea v. Caledonian Oileries, Ltd.* [1928], A. C. 356 (P. C.). But a Provincial use tax on fuel oil, measured by

2. *The Decisions of this Court.*—The rules of intergovernmental tax immunity, so far as they have been developed and applied to private per-

amounts consumed, was sustained as direct, because it would not be passed on intact. *Attorney General for British Columbia v. Kingcome Navigation Co.* [1934], A. C. 45 (P. C.). Similarly, a general retail sales tax imposed on the purchaser, but collected through the seller, could be ruled constitutional as a direct levy. *Cf. Atlantic Smoke Shops, Ltd., v. Attorney General for New Brunswick*, 15 M. P. R. 278 (S. Ct. N. B., 1940); *Parsons v. Court of Sessions of the Peace*, 78 Que. 377 (Super. Ct., 1940) (tobacco consumption taxes collected by vendor); see McDonald, *Taxation Powers in Canada* (1941), 19 Can. Bar Rev. 75, 83-84. Such a vendee sales tax is levied by the Province of Quebec. 4 Geo. VI, c. 14 (Que. 1940). Although there has been no adjudication of the validity of the tax when imposed on sales to the Dominion Government or its instrumentalities, it would seem to be invalid as an intergovernmental property tax since it must be direct in order to be imposed at all. This principle is recognized in Canada with respect to Dominion purchases in the war program, and has been extended, by agreement with the Province of Quebec, to immunize purchases by contractors with the Dominion Government of articles going into construction. See memorandum of Deputy Minister of Munitions and Supply to Directors General of Branches, dated July 14, 1941.

In Australia a corporation selling bridge piling to a second corporation which had a limited highway construction and maintenance franchise from the State of Queensland, title to the bridge to vest in the state at the end of the franchise period, resisted the Commonwealth sales tax on the ground that the piling was actually being sold to Queensland. *M. R. Hornibrook (Pty.), Ltd., v. Federal Commissioner of Taxation*, 62 C. L. R. 272, 282 (H. C., 1939). While the court found it unnecessary to pass on the contention, the fact of its having been advanced reflects the probable existence in law of the supporting premise that purchases by a State are immune.

sons who deal with the government, exhibit a great diversity of decision and reasoning. A number of cases have expressly been overruled;²¹ many more have been distinguished on the narrowest of grounds;²² and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases.²³ In

²¹ *Long v. Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp. v. Doyal*, 286 U. S. 123; *Gillespie v. Oklahoma*, 257 U. S. 501, and *Burnet v. Coronado Oil Co.*, 285 U. S. 393, overruled by *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *The Collector v. Day*, 11 Wall. 113, and *N. Y. ex rel. Rogers v. Graves*, 299 U. S. 401, overruled in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466; compare *Evans v. Gore*, 253 U. S. 245, and *Miles v. Graham*, 268 U. S. 501, apparently overruled by *O'Malley v. Woodrough*, 307 U. S. 277.

²² Compare, e. g.: (1) *Brush v. Commissioner*, 360 U. S. 352, with *Helvering v. Gerhardt*, 304 U. S. 405; (2) *Dobbins v. Erie County*, 16 Pet. 435, with *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co. v. Knox*, 277 U. S. 218; *Indian Motorcycle Co. v. United States*, 283 U. S. 570; and *Graves v. Texas Co.*, 298 U. S. 393, with *Alward v. Johnson*, 282 U. S. 509; *Wheeler Lumber Co. v. United States*, 281 U. S. 572; and *James v. Dravo Contracting Co.*, 302 U. S. 134; (4) *Macallen Co. v. Massachusetts*, 279 U. S. 620, with *Pacific Co. v. Johnson*, 285 U. S. 480.

²³ Cf., e. g., (1) *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint v. Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes, and Stone dissenting in *National Life Ins. Co. v. United States*, 277 U. S. 508, 527); (2) *Indian Motorcycle Co. v. United States*, 283 U. S. 570, with *Liggett & Myers Co. v. United States*, 299 U. S. 383; (3) *Telegraph Co. v. Texas*, 105 U. S. 460, and *Williams v. Talladega*, 226 U. S. 404, with *James v. Dravo Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce v. New York City*, 2 Black 620, and *Home Savings Bank v.*

short, there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

Measured against the fluctuating doctrines and the contrariety of results reached in the cases of taxes directed at private persons who deal with the government, the decisions relating to a tax on the United States itself show an unqualified uniformity. No decision of this Court has ever held, in the absence of legislative consent, that the national government could be taxed by a state or local government. No Justice of this Court has dissented from this result in any case which we have found.²⁴

Although the Second Bank of the United States had a preponderantly private stock ownership,²⁵

Des Moines, 205 U. S. 503, with *Society for Savings v. Coite*, 6 Wall. 594; *Des Moines Bank v. Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co. v. Pennsylvania*, 302 U. S. 506.

²⁴ Two unreported cases apparently were affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 175-177. One, *United States v. Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach v. Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

²⁵ The Government, under its charter, was to subscribe to only twenty percent of the stock; its subscription was in fact approximately that proportion throughout the life of the bank. Holdsworth and Dewey, *The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong., 2d Sess.

the Court viewed it as a part of the Government itself. *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborn v. United States Bank*, 9 Wheat. 738, held the bank to be immune from discriminatory taxation upon its transactions. In *United States v. Railroad Company*, 17 Wall. 322, the Court held invalid a federal tax on interest payments received by the City of Baltimore.²⁶ *Van Brocklin v. State of Tennessee*, 117 U. S. 151, held land acquired by the United States from a tax defaulter to be exempt from state taxation.²⁷ *Federal Land Bank v. Crosland*, 261 U. S. 374, turned on a statutory provision for immunity, but the decision exempting mortgage recordation from state taxation has

²⁶ The tax might well have been construed as laid upon the railroad, but the Court held otherwise (pp. 325-327). It is not wholly clear whether the Court construed the Act to exempt the municipal income or held it invalid as there applied; Justice Bradley concurred on the ground that the Act intended to exempt such income (p. 333). Justices Clifford and Miller dissented on the ground that the city held the railroad bonds in a proprietary capacity.

²⁷ A large number of other cases have held, under varying circumstances, that land owned by the United States is exempt from state or local taxation. E. g.: public lands prior to patent or passage of equitable title to private persons: *Colorado Company v. Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co. v. Traill County*, 115 U. S. 600; *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 504; *Irwin v. Wright*, 258 U. S. 219; lands held in trust for Indians: *United States v. Rickert*, 188 U. S. 432; lands reassessed after acquired by private grantee: *Lee v. Osceola Imp. Dist.*, 268 U. S. 643.

since been cited by this Court as a decision based on the Constitution in the silence of Congress.²⁸ In *Clallam County v. United States*, 263 U. S. 341, 344, the land and physical property of a corporation wholly owned by the Government was held exempt from local taxation, although "no specific words forbid the tax." In *New Brunswick v. United States*, 276 U. S. 547, the equitable interest of a wholly owned Government corporation, in land sold with the reservation of a purchase money lien, was held beyond the reach of the state in selling land for unpaid taxes.²⁹

3. *The Valid Criterion*.—It seems clear enough, therefore, that the Court has uniformly held the operations and the property of the Government itself to be immune from taxation, so long as there is no express waiver of that immunity by Congress.

²⁸ See *Macallen Co. v. Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp. v. Ward*, 282 U. S. 379, 389; cf. *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477.

²⁹ In *Baltimore National Bank v. Tax Commission*, 297 U. S. 209, it is true, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares held by it, but this was only because Section 5219 of the Revised Statutes was construed to permit taxation of those shares by whomever held. Even with this inferential support for the tax liability, the Court seems to have underestimated the Congressional reluctance that the Government itself be taxed. The Act of March 20, 1936 (c. 160, 49 Stat. 1185, 12 U. S. C., Supp. IV, 51d), passed six weeks after the Court's opinion, extended the R. F. C. a retroactive as well as prospective immunity from such taxation.

This consistency of decision has a redoubled force, since it stands in such marked contrast to the cases dealing with private taxpayers.

The validity of taxes challenged as invading the immunity of the Government should be decided, we therefore submit, in terms of the legal incidence of the tax. This formula by which to delineate the constitutional immunities of the United States is not advanced as a test which can be applied with technical rigidity. In determining the application of constitutional immunities, the Court has looked to substance and reality, not to form. *National Life Ins. Co. v. United States*, 277 U. S. 508, 519; *Missouri v. Gehner*, 281 U. S. 313, 321. In terms of the present issue, we urge that the purchases which the United States makes through the cost-plus-a-fixed-fee contractor are in reality those of the United States and not those of the contractor. In Point III we demonstrate this in detail. It is sufficient here to note that, in advancing a test based upon the legal incidence of the tax upon the Government or a private person, we do not speak in terms of technicalities but in terms of the realities of the governmental functions with which the constitutional protection is concerned. Accordingly, our formula is not one which will in every case permit a mechanical application and thus put an end to the problems of intergovernmental tax immunity. We do, however, believe that those problems would permit a

more comprehensible and predictable solution if approached in this manner, rather than through the use of generalities impossible of a specific application."

D. THE IMMUNITY INCLUDES A VENDEE SALES TAX COLLECTED
THROUGH A PRIVATE PERSON

We have shown that the Alabama sales tax is imposed upon the vendee and we urge at a subsequent point that the immunity of the United States is not lost because it makes its purchases through a cost-plus-a-fixed-fee contractor. Here it may be assumed that the Alabama tax is laid on the purchaser and that the United States has made the purchases directly. The problem, then, is simply whether the immunity of the United States from a state tax imposed upon it includes a sales tax the legal incidence of which is upon the purchaser but which is collected through the seller. Whether, in other words, the Government's immunity vanishes if the tax is collected from the Government by the vendor instead of by a direct payment to the tax collector of the State.

²⁰ The question even under our approach would remain as to when the tax is imposed upon the Government. Here, for example, the parties and the lower courts differ as to whether purchases made through the cost-plus-a-fixed-fee contractor are those of the Government. And in *Query v. United States*, No. 619, this Term, a major question is whether an Army post exchange has the status of the Government. But this approach quite obviously encounters many fewer ambiguities than lurk behind the words "direct," "burden," "interference," and "cost."

1. *It is Immaterial That the Tax is Collected Through the Seller.*—We are wholly clear that a tax is in fact laid upon the United States if the legal incidence is on the Government, whether or not collected from it directly. This is indicated (a) by the settled rule that the real tax incidence is not affected by collection through an immune instrumentality, (b) by the decisions of this Court sustaining an immunity of the United States even though the tax was physically paid to the state by a private person, and (c) by the practical operation of the vendee sales tax.

(a) It has been settled by many decisions of this Court that a state tax the legal incidence of which is on a private person may be imposed even though it is collected through a federal instrumentality which could not itself be taxed. In *National Bank v. Commonwealth*, 9 Wall. 353, 362-363, the Court sustained a state tax on the shareholders of a national bank, which could not have been imposed on the bank, although the tax was collected from the bank. The decision has been followed in many subsequent decisions.²¹

²¹ *Lionberger v. Rouse*, 9 Wall. 468, 477; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 239; *Van Slyke v. Wisconsin*, 154 U. S. 581; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444-446; *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, 466; *Covington v. First National Bank*, 198 U. S. 100, 111; *Home Savings Bank v. Des Moines*, 205 U. S. 508, 518; *Des Moines Bank v. Fairweather*, 263 U. S. 103, 111-112.

And in *Colorado Bank v. Bedford*, 310 U. S. 41, the Court upheld a tax on the privilege of renting safe-deposit boxes because, although collected from the bank, the legal incidence was upon the private user. It said (pp. 52-53):

The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. * * * As the user furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but * * * as the responsible obligor, we conclude the tax is upon him, not upon the bank. * * *

The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality.

The Court has made corresponding rulings with respect to instrumentalities of interstate commerce.³² Compare, also, *Helvering v. Therrell*, 303 U. S. 218, 225; *Stahmann v. Vidal*, 305 U. S. 61.

It has conclusively been settled, then, that a tax the legal incidence of which is upon a private person may be collected through an instrumentality

³² *Monamoter Oil Co. v. Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62, 67-68; *McGoldrick v. Berwind-White Coal Co.*, 309 U. S. 33.

which could not itself be taxed. The converse would seem inescapably to follow: that a tax the legal incidence of which is upon the Government may not be collected, whether directly or through a private person.

(b) This is demonstrated by the fact that a good number of the cases cited above (pp. 57-59) for the proposition that the United States may not itself be taxed were occasioned by taxes which were collected through private persons and were invalidated only because their legal incidence was upon the United States. *Van Brocklin v. State of Tennessee*, 117 U. S. 151, arose upon a bill to foreclose a tax lien on land then owned by private persons under conveyance from the United States; the state had made no attempt to collect from the Government itself. So, too, has each of the six other cases, cited (note 27, *supra*, p. 58) to illustrate the immunity from state taxation of public lands of the United States, arisen out of attempts by the state officer to collect through a private person. And in *New Brunswick v. United States*, 276 U. S. 547, the Court affirmed the immunity from state taxation of land owned by the United States (p. 555) and protected its purchase money lien from the state tax sale (p. 556), even though the tax was to be collected and enforced through the private person.

(c) The teaching of the cases is confirmed by the practical operation of the vendee sales tax. The purchaser who goes into the retail store is quoted a price which excludes the tax, and pays the sales tax separately. To make his tax payments more economically, he can purchase tax tokens to be used when the tax is less than one cent. The purchaser who buys on order draws his check to include two items, the sale price and the separably billed sales tax. The purchaser who meets a sales tax in this fashion would be hard to convince that he had not paid the tax simply because he paid it to the seller rather than directly to the tax collector.

The impact of practical experience, then, confirms the inferences in the decisions of this Court, and shows that a vendee sales tax is nonetheless upon the Government because its seller has been required to serve as tax collector for the State.

2. *The Sales Tax Imposed on the Vendor.*—Our analysis, the Court will have observed, is couched in terms of the legal incidence of the tax. If it is imposed on the Government it is invalid. But, if it is imposed upon a private person and does not discriminate against the transactions of the Government, it is valid. The tax on the private person is not, in our view, invalidated by the facts that it is directed at the transaction with the Government, that his taxed proceeds flow from

the Government, or that the economic burden of the tax will in all likelihood be shifted to the Government. Cf. *James v. Dravo Contracting Co.*, 302 U. S. 134.

By this approach we are unable to rely upon the four sales-tax cases decided by this Court, each over a vigorous dissent. For each of these cases involved a sales tax, the legal incidence of which was upon the private seller, not upon the governmental purchaser.

In *Panhandle Oil Co. v. Knox*, 277 U. S. 218, the Court held that the Mississippi gasoline tax could not be applied to sales to the United States because it was laid upon the transaction of the Government and burdened its operations; Justices Holmes, McReynolds, Brandeis, and Stone dissented. The tax was laid upon the seller, not upon the purchaser.³³ The decision was followed, *per curiam*, in *Graysburg Oil Co. v. Texas*, 278 U. S. 582, reversing *Grayburg Oil Co. v. State*, 3 S. W. (2d) 427 (Comm. of App., Tex., 1938). That case invalidated the Texas gasoline tax as ap-

³³ The tax was imposed by Mississippi laws of 1922, ch. 116. It provided, in Section 2:

"Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c per gallon upon the sale of gasoline by such dealer in this state, * * *."

The act contains nothing to suggest that the legal incidence of the tax was to be upon the purchaser.

plied to sales to the United States. It, too, was a tax upon the vendor.³⁴ The *Panhandle* ruling was followed in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, where the court held invalid a federal excise upon the sale by the manufacturer, as applied to goods sold to a municipality, because the tax was laid upon the transaction with the local government. Justice Holmes concurred on the authority of the *Panhandle* case, while Justices Stone and Brandeis dissented. The tax was one on the vendor rather than the manufacturer.³⁵ Finally, in *Graves v. Texas Co.*, 298 U. S. 393, the Court held invalid, as applied to sales to the United States, the Alabama tax upon withdrawal of gasoline from storage. The decision was based upon the practical effect of the tax in increasing the costs of the Government. Justice Stone took

³⁴ The statute was Texas Revised Civil Statutes, 1925, Art. 7065. It provided:

"Every person selling at wholesale in intrastate commerce in this State any gasoline shall pay to the State of Texas an occupation tax equal to one cent per gallon of all such gasoline so sold by such person. * * *

It contains nothing to suggest that the tax was intended to be laid upon the purchaser.

³⁵ Section 600 of the Revenue Act of 1924, 43 Stat. 253, 322, provides:

"* * * there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—" The act contains nothing to suggest that the legal incidence was to be upon the purchaser.

no part and Justices Cardozo and Brandeis dissented. The tax was upon the seller alone."

These cases, then, involved a tax which was imposed upon a private person, not upon the Government. As we read the subsequent decisions of this Court, a nondiscriminatory tax on a private person cannot be escaped because it is imposed upon the transaction with the Government, or because its economic burden will be shifted to the Government. *James v. Dravo Contracting Co.*, 302 U. S. 134. We are wholly unable to distinguish between the sale of goods to the United States and the sale of goods and services to the United States which is represented by the contract with the independent contractor. For this reason, we submitted our argument in the *Dravo* case upon the assumption that it could be sustained only by overruling the vendor sales-tax cases. The Court was perhaps of a contrary view, for it sustained our conclusion and yet disposed of the vendor sales tax cases by the statement that "These cases have been distinguished and must be deemed to be

³⁰ The case involved a series of taxes (298 U. S. at 395) of which the latest is typical. The Alabama Laws of 1935, p. 509, sec. 348, schedule 156.1, provided:

"Every distributor, refiner, retail dealer, or storer of gasoline as herein defined shall pay an excise tax of six cents (\$0.06) per gallon upon the selling, distributing, storing, or withdrawing from storage in this State for any use, gasoline as herein defined, * * *."

None of the statutes contain anything to suggest that the legal incidence of the tax was to be upon the purchaser.

limited to their particular facts" (302 U. S. at 151). Yet the subsequent opinions of this Court have not suggested that these cases have any continuing vitality," and no commentator has advanced any satisfactory principle of reconciliation with the *Dravo* case.

We conclude, therefore, that the vendor sales tax cases were wrongly decided. Whether their result is good law today would depend solely upon the extent to which the immunity based upon these cases has been received into the legislative field by congressional acquiescence (see *infra*, pp. 80-81). But, as an interpretation of constitutional immunity, the cases can no longer be accepted. See Opinion of the Attorney General to the Secretary of War, August 5, 1939.

Our argument, in short, is that in the silence of Congress the inferences from the Constitution

³⁷ In *Helvering v. Therrell*, 303 U. S. 218, 222, the *Indian Motorcycle* case was cited for the proposition that tax immunity questions had frequently been before the Court. In *Helvering v. Gerhardt*, 304 U. S. 405, 417-418, the *Indian Motorcycle* case was cited in a historical survey of the decisions but was not replied upon, while the dissenting opinions in both the *Panhandle* and the *Indian Motorcycle* cases were cited with apparent approval (304 U. S. at 414, 421), and two other citations of the *Indian Motorcycle* case indicate at the least a reservation of approval (304 U. S. at 419, 423). In *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 484, only the dissenting opinion in the *Indian Motorcycle* case was cited. The sales tax cases were ignored in *Helvering v. Producers Corp.*, 303 U. S. 376; *Allen v. Regents*, 304 U. S. 439; *Pittman v. Home Owners' Corp.*, 308 U. S. 21. They have not, except as here indicated, been cited in a majority opinion of this Court since the *Dravo* decision.

show that the Government in making its purchases is immune from a vendee sales tax but that the seller may not escape a vendor sales tax because he chances to sell to the Government. The analysis may result in a practical anomaly, to the extent that the economic incidence of a vendor sales tax may coincide with that of a vendee sales tax.³³ But, since the question of immunity or liability must in the end be decided by Congress, the decision of this Court should be reached in full recognition of the responsibility of the legislative branch of the Government to make, if it chooses, the practical political and economic decision whether sales taxes of any variety should be allowed or forbidden on the Government's purchases. The Court, in short, is faced in this case with a decision based upon the implications of the Constitution. That decision need not be, and should not be, based upon the legislative considerations of practical equality between one state and another. That decision, as the underlying decision whether any sales tax should be allowed, is properly for Congress and not for the courts.

E. THE INTENT OF CONGRESS

We have made amply plain our view that the difficulties of this case arise only because Congress has not determined the political question whether or not the Government should pay state sales taxes on its purchases (*supra*, pp. 36-38, 70). We have

³³ Cf. *Conlon*, Express or Implied Exclusions from Consumption Taxes, 7 Law & Contemp. Prob. 544, 599, 610.

assumed that Congress has been entirely silent on the question, and that we are dealing with a question simply of constitutional inference.

However, our case is in truth much stronger than indicated by this assumption. For there are four separate ways to find a reasonably reliable indication of what Congress would have done had it chosen to act. Each of these *indicia* of the congressional intention shows that the Government would have been immunized from state sales taxes had Congress thought it necessary to act. It is unnecessary in this case to determine whether or not they are entitled in the aggregate to be given the force which would be accorded an express immunization of the Government's purchases by Congress.³⁹ For the congressional intention, as revealed by each of these inquiries, corroborates rather than contradicts the inferences to be drawn from the Constitution alone.

1. *Congressional Acquiescence*.—The United States in making its purchases has, as a matter of actual practice, never recognized its liability for amounts representing state sales taxes the legal incidence of which is on the purchaser.⁴⁰ And in the years following *Panhandle Oil Co. v. Knox*, 277

³⁹ This problem is considered, but not answered, in the final subdivision of this section (*infra*, pp. 80-81).

⁴⁰ However, if bids for necessary material cannot be obtained without an inclusion of the sales tax, the procurement agency is authorized to purchase the goods and leave to the Comptroller General the question of reimbursement. 19 Comp. Gen. 909.

U. S. 218, the Government's procurement practice of not paying state sales taxes was recognized and made known to all by the decisions of this Court. The Comptroller General, both before the *Panhandle* decision and after the *Dravo* decision has refused to approve any payments of amounts representing state vendee sales taxes.⁴¹ It is entirely improbable that this practice has not been well known by Congress.

It has, on the other hand, been settled ever since *Van Allen v. The Assessors*, 3 Wall. 573, that Congress could waive a tax immunity which it considered undesirable.⁴² This power has been exercised by Congress with great frequency.⁴³

⁴¹ Since the establishment of the General Accounting Office he has consistently ruled against payment by the Government of state *vendee* sales taxes. (1921) 1 Comp. Gen. 229; (1933) 13 Comp. Gen. 91; (1939) 19 Comp. Gen. 832; (1939) 19 Comp. Gen. 1. Early he took a contrary position with respect to *vendor* sales taxes on dealers. E. g. (1922) 1 Comp. Gen. 584; (1925) 4 Comp. Gen. 1041; (1927) 7 Comp. Gen. 360. After the decision in the *Panhandle* case he reversed this stand. (1932) 11 Comp. Gen. 489; (1937) 17 Comp. Gen. 375. Still more recently, however, he decided that a retailers' occupational tax measured by gross receipts from sales could be included in the Government's purchase price as an element of the cost where the legal incidence of the tax was on the dealer. (1938) 17 Comp. Gen. 863 (Illinois tax). It is plain that this ruling was made in view of *James v. Dravo Contracting Co.*, 302 U. S. 134, and that the Comptroller adheres to his position in barring payment of *vendee* sales taxes. See (1939) 18 Comp. Gen. 832, 834-35.

⁴² See also the cases cited *supra*, p. 37.

⁴³ See *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 522-523; *British-American Co. v. Board*, 299 U. S. 159, 161, 166.

Congress, then, must be acknowledged to have known of the Government's immunity from state sales taxes and of its power, if it so chose, to waive this immunity. Yet it has done nothing. This may, then, amount to a conscious acquiescence by Congress in the practice of sales tax immunity and to an indication that it intends the Government to retain its immunity.

The decisions of this Court are not wholly consistent as to the force to be given congressional acquiescence in a judicial interpretation of the constitutional inferences to be applied in the silence of Congress. In *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480, the Court declared—

it is plain that there is no basis for implying a purpose of Congress [by its silence] to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution.

This statement has no certain application here, for the tax burden is not unsubstantial. Whether or not the economic burden of the tax is shifted is irrelevant to the inferences to be drawn from the

More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the Government's brief in *Pittman v. Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 34-35, some thirty-two Acts by which the Congress, in the course of only three Congress (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.

Constitution, but is highly relevant as regards the legislative decisions of Congress. And the force of the statement in the *O'Keefe* case is somewhat weakened by the contrary rule in other fields. Congress by its silence may be supposed to have acquiesced in judicial rules as to the scope for state action in the field of interstate commerce, *Gwin, Etc., Inc. v. Henneford*, 305 U. S. 434, 441. Its silence, even though there is far less reason than here to suppose cognizance by the members, indicates acquiescence in an administrative fiscal practice, *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524-525, and in a provision of the Rules of Civil Procedure, *Sibbach v. Wilson & Co.*, 312 U. S. 1, 14-15. And in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 487-489, the Court placed heavy reliance upon the failure of Congress to amend the Sherman Act as indicative of congressional acquiescence in its decisions.

Where the decisions of this Court, the procurement practice of the United States, the fiscal practice of the states, and the power of Congress to alter the existing rules are each so well known it would be thoroughly unrealistic to suppose that Congress did not by its silence intend the existing rules to continue in force.

2. *The Corporation Acts*.—The Government in *Federal Land Bank v. Bismarck Lumber Co.*, No. 76, this Term, has argued at length that the standard tax exemption clause in the acts creating

Government corporations exempts them in making their purchases from state sales taxes imposed upon the buyer. That argument need not be repeated here. It is sufficient to note the following propositions from that brief: A number of statutes have created government-owned corporations with this clause in their basic charters (p. 21). Each has exempted from state taxation the corporation in question (pp. 17-20). The legislative history suggests the desire of Congress by this clause to exempt them from all state taxation except that on real property (pp. 21-22). The Reconstruction Finance Corporation Act has twice been amended, each time clarifying the broad exemption intended by Congress and the second time expressly declaring that the exemption included sales taxes (pp. 22-25). The federal administrative practice has been uniform that these corporations are exempt from vendee sales taxes, and the state administrative and judicial practice has slightly oftener than not been in accord (pp. 33-37, 68-80). The conclusion seems necessarily to follow that Congress has exempted these corporations from state sales taxes imposed upon the purchaser.

It is wholly improbable that Congress would have conferred upon the government corporations an immunity from state sales taxes which it did not believe and desire to be possessed by the United States itself, of which these corporations

are a part. No reason, of theory or of expediency, can be advanced to support a congressional intention to immunize a corporate branch of the Government while leaving the United States itself liable to taxation.

3. *The Government Reservations.*—Congress by two statutes has extended to the states authority to impose sales taxes in areas over which the United States would otherwise have exclusive jurisdiction. Each act excepts from this authority the power to tax sales to the United States.

The Act of June 16, 1936, 49 Stat. 1519, in section 10 authorizes the imposition of gasoline sales taxes upon sales made in Government reservations "when such fuels are not for the exclusive use of the United States." "

Again, the Act of October 9, 1940, 54 Stat. 1059 authorizes state taxation of sales made on federal reservations to private persons, but excludes from this authorization sales made to or by the United States or its instrumentalities. Sec. 3 (a) provides that the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof,

" The section was inserted as an amendment to the House bill on the floor of the Senate, in response to a resolution of the North American Gasoline Tax Conference. This resolution (80 Cong. Rec. 6913), the statement of the House conferees (80 Cong. Rec. 8693), and the statement of the House member in charge of the conference report (80 Cong. Rec. 8701) each show that authority to tax sales to the Government was not intended.

or * * * with respect to sale * * * by the United States or any instrumentality thereof * * *." Sec. 6 (b) excepts from the Act the authority to impose gasoline taxes on federal reservations which had already been granted by section 10 of the Act of June 16, 1936. The committee reports make plain that the authority to tax does not extend to sales to the United States. One report of the Senate Committee states that "This bill will not permit the collection of a State sales tax with respect to purchases made by the Federal Government in the exercise of an essential governmental function * * *." S. Rpt. 1028, 76th Cong., 1st sess., pp. 1-2. Another points out that no tax may be collected from the United States or any instrumentality thereof, and also, that no tax may be imposed on sales by the United States or its instrumentality; it notes that the authority is continued to tax gasoline sold in federal areas "for private purposes." S. Rpt. No. 1625, 76th Cong., 3d sess., pp. 3-4.⁴⁵

It seems to us wholly improbable that Congress, in granting permission to impose the sales taxes, would deny to the states authority within the federal enclave to tax sales to the Government if it had considered that they had such authority generally.

⁴⁵ The House report, and the quoted letter from the Secretary of Treasury, each note that no authority is given to levy taxes which would otherwise be constitutionally forbidden. H. Rept. No. 1267, 76th Cong., 1st sess., pp. 2-3.

4. *The Federal Excise Taxes.*—An equally persuasive indication of the intent of Congress is found in its extensive and virtually uniform exemption from federal excise taxes of sales to states and municipalities.

The Internal Revenue Code contains a general exemption of such sales from the then temporary manufacturers excise and import taxes. I. R. C. secs. 3442, 3443 (a) (3) (A) (i).⁴⁶ The retailers excise taxes added by section 552 of the Revenue Act of 1941, Pub. No. 250, 77th Cong., 1st sess., contain a corresponding exemption of sales for the exclusive use of states and their political subdivisions. I. R. C. sec. 2406. In addition, there is a long list of specific exemptions of articles sold to states and their subdivisions from the excise taxes on the manufacture and sale of vegetable oils (I. R. C. sec. 2473), narcotics (I. R. C. secs. 2551 (c) (1), 3222 (b)), pistols and revolvers (I. R. C. sec. 2700 (b) (1)), machine guns and short-barrelled shotguns (I. R. C. sec. 2721 (a)), marijuana (I. R. C. sec. 3232 (b) (1)), electric energy (I. R. C. sec. 3411 (c)), and telegraphic, cable, and telephone service (I. R. C. sec. 3466, amended by sec. 548 of the Revenue Act of 1941). A corresponding exemption is granted from the documentary-stamp tax (I. R. C. sec. 1808 (a)), the

⁴⁶ The provision was added by sec. 621 of the Revenue Act of 1932, 47 Stat. 268, after the decision in *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

admissions tax (I. R. C. sec. 1701 (a) (1)), and the vehicle-use tax (Revenue Act of 1941, sec. 557; I. R. C. sec. 3540 (j)).

There is an analogous general exemption from the federal excise tax of articles sold for the use of the United States (I. R. C. sec. 3331). In addition, with two minor exceptions,⁴⁷ each of the exemptions specified in the previous paragraph includes also articles sold to the United States.

This consistent policy of Congress to exempt from its excise taxes articles sold to the United States or to states or their political subdivisions is extremely strong evidence that Congress understands and intends that the United States should have a corresponding exemption from state sales taxes. It is hardly to be expected that Congress would intend to create a tax immunity situation so one-sided as to permit state taxation of sales to the federal government and yet to exempt from federal taxation sales to the state governments.

Particularly is this the case when it is considered that the federal taxes, in general, are manufacturers taxes rather than sales taxes, and thus are measurably more remote from the governmental purchaser than is the case with the state sales taxes. See *Liggett & Myers Co. v. United States*, 299 U. S. 383; *Wheeler Lumber Co. v. United States*, 281 U. S. 572; cf. *Indian Moto-*

⁴⁷ These are the excise taxes on vegetable oils (I. R. C. sec. 2473) and admissions (I. R. C. sec. 1701 (a) (1)).

cycle Co. v. United States, 283 U. S. 570. It seems to follow *a fortiori* that Congress, in exempting sales to the states from the federal manufacturer's excise taxes, contemplated an exemption of sales to the United States from state vendee sales taxes.

5. *The Congressional Intent as to Vendor Taxes.*—We have urged that in the silence of Congress the implications of the Constitution forbid application of a vendee sales tax to the purchases of the Government but allow the application of a vendor sales tax. We have shown evidence that Congress intends an immunity from sales taxes on the Government's purchases in that: (1) it has acquiesced in the practice and the decisions of this Court; (2) it has immunized government corporations from sales taxes imposed upon them; (3) it has allowed state sales taxes to be imposed on federal reservations except as to sales to the Government; and (4) it has exempted sales to the states and the United States from its own excise taxes.

The third and the fourth of these *indicia* of the congressional intention would apply equally to vendor as to vendee sales taxes. With respect to those taxes, the argument might sometime be made that the indications of congressional intention aggregate into an inferential action by Congress which is sufficient to alter the rule, drawn from the implications of the Constitution, which would obtain in the silence of Congress. That question would not be wholly free from difficulty, but it need not be answered in this case. For, as we have shown, the Alabama sales tax is imposed upon the

purchaser. In this case, then, the constitutional implications and the evidence of congressional intention are in complete agreement, and unite to show that the United States in making its purchases is exempt from the Alabama sales tax.

III

THE IMMUNITY OF THE UNITED STATES IS NOT LOST WHEN IT PURCHASES THROUGH THE MEANS OF A COST-PLUS CONTRACTOR

We have shown that the Alabama sales tax is imposed upon the buyer and not upon the seller, and that the United States in making its purchases is immune from such a tax. There remains only the narrow question whether the immunity which would otherwise exist disappears when the United States makes its purchases through a cost-plus-a-fixed-fee contractor rather than through one of the regular procurement branches of the Government. The court below held that the immunity was retained. The Supreme Court of Florida held to the contrary in *Standard Oil Co. v. Lee*, 199 So. 325; it relied upon an admission that the appellant was an independent contractor and upon the contractual undertaking to pay applicable taxes. The Supreme Court of Louisiana in *Standard Oil Co. v. Fontenot*, decided October 17, 1941, on grounds not now available, followed the *Lee* case.

A. THE GENERAL STATUS OF THE COST-PLUS CONTRACTOR

The Supreme Court of Alabama wisely refrained from deciding whether the contractor was an

"agent" or an "independent contractor" in its activities generally (R. 151), but confined its attention to the actual purchase of supplies.¹ By the same token, we think it unprofitable to attempt to extract from the cases any litmus through which to determine whether the cost-plus contractor is an "instrumentality" of the United States, and by the strength of that label entitled without more to share the immunity of the United States.² The issue, instead, is far more concrete: whether the Alabama tax is imposed upon the purchases of the United States or upon those of a private person. The

¹ The contractor may well be an agent in some aspects of the work and an independent contractor in others. See *Galatin v. Miller*, 139 Wash. 521, 524 (1926); *Page*, Law of Contracts (2d Ed., Supp.) I, sec. 1728.

² The terms "agent" and "instrumentality" by their nature are question-begging. Every employee, contractor, or vendor of the Government, and every organization created by Congress, is a federal agent or instrumentality in the sense that the activities advance a federal purpose. Yet none would suggest that the employee, or the organization "having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County v. United States*, 263 U. S. 341, 345), is entitled to a generalized immunity in all of its transactions equivalent to that of the Government itself. The term "instrumentality" in tax immunity litigation means, in short, either: (1) the organization is a part of the Government itself, or (2) in the particular transaction the private organization acts in such a manner that it is of necessity included within the Government's immunity. In the second sense of the word, which alone concerns us here, the term "instrumentality" describes not the general status of the private organization but the relationship of the tax to the Government.

issue, when narrowed in this manner, must of necessity be decided in terms of the relation to the United States of the purchase transaction itself. That transaction, however, receives at least oblique illumination from the general relationship of the parties. We shall, therefore, first briefly sketch the underlying arrangements between the United States and its cost-plus-a-fixed-fee contractors, as illustrated in the present record.

The United States retains a broad degree of control over the manner of performance of the cost-plus contract (see Statement, *supra*, pp. 6-10). But, apart from the machinery and controls surrounding the purchase transaction, the general control provisions are not markedly dissimilar from the standard forms for lump-sum contractors with the Government. There are, it is true, differences of some significance. The cost-plus-a-fixed-fee contract emphasizes that the contractor is "subject in every detail" to the supervision of the contracting officer (R. 50). It requires that books and records be kept, and that they be always open to Government inspection (R. 59). The contracting officer shall specify the required insurance and bonds (R. 59). The contractor shall submit a chart of his personnel, together with their duties and rates of pay, to the contracting officer, and an explanation of the administrative procedures to be followed (R. 66-67). The contracting officer must approve

in advance the qualifications of persons in certain supervisory positions (R. 53).³

These provisions are not found in the lump-sum contract.⁴ Their presence illustrates the basic contrast between the relation of the Government to the cost-plus contractor and that to the lump-sum contractor. The latter undertakes, for a price determined by the contract, to deliver a completed construction work to the United States. The United States has no interest in the manner of the performance of the contract, except so far as it bears upon the quality and the timeliness of the work. The cost-plus-a-fixed-fee contractor, on the other hand, stands in a different position. Since the United States has agreed to reimburse every legitimate expenditure, it has a direct interest in the manner in which every dollar is spent, and in the disposition of every piece of material and the use of every laborer. The manner and the costs of the work are the concern of the Government to the same extent as though it were undertaking the construction of the project itself.

The fact that the contractor is paid his costs, plus a fee, instead of a lump sum, does not of it-

³ The instructions to the constructing quartermasters emphasize that this is their responsibility (R. 103, 112, 116-117).

⁴ The standard lump-sum contract is U. S. Standard Form No. 23—Rev., revised and approved by the Secretary of the Treasury, September 14, 1940.

self convert him into an agent.⁵ But as a consequence of this basic feature of the contract, the control reserved to the Government might well be argued for many purposes to convert Dunn & Hodgson into an agent instead of an independent contractor.⁶ It is, however, unnecessary to pursue this inquiry. The general provisions of the contract, whatever might be their force in an issue

⁵ In a number of cases, a cost-plus contractor has been held not to be an agent or an employee of the person with whom he contracts. In each of these cases the principal's degree of control was far less than that of the United States under this contract, and each relates to a part of the contract in which the responsibility was rather plainly to be traced to the contractor rather than the principal. Suits by employees, material men, and subcontractors: *United States v. Driscoll*, 96 U. S. 421; *Employers' L. Assur. Corp. v. United States Shipping Bd. E. F. Corp.*, 290 Fed. 182 (C. C. A. 2); *Kruse v. Revelson*, 115 O. St. 594 (1927); cf. *Baumann v. West Allis*, 187 Wis. 506 (1925). Suits for the recovery of damages from the contractor's negligence: *Foundation Co. v. Henderson*, 264 Fed. 483, 484-485 (C. C. A. 5); *J. B. McCrary Engineering Co. v. White Coal Power Co.*, 35 F. (2d) 142, 146 (C. C. A. 4); *Whitney and Starvette Co. v. O'Rourke*, 172 Ill. 177 (1898); *Morgan v. Smith*, 159 Mass. 570 (1893); *Carleton v. Foundry Co.*, 199 Mich. 148, 159 (1917). The petitioner's brief (pp. 44-48) contains a more elaborate collection of these cases.

⁶ See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 520-521; *Casement v. Brown*, 148 U. S. 615, 622; *Chicago Rock Isld. & Pac. Ry. v. Bond*, 240 U. S. 449, 455-456; *The Standard Oil Co. v. Anderson*, 212 U. S. 215, 222-225; *Railroad Company v. Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523; American Law Institute, *Restatement of Law of Agency*, secs. 2, 220; cf. *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, 472; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149.

involving the general status of the cost-plus contractor, indisputably show a degree of control and an immediacy of interest on the part of the Government which corroborate rather than qualify the evident fact that in the purchase transactions themselves, which alone are relevant here, the cost-plus-a-fixed-fee contractor acts only as a convenient means through which the United States makes its purchases.

**B. THE PURCHASES MADE THROUGH THE COST-PLUS CONTRACTOR
ARE THOSE OF THE UNITED STATES**

Whatever may be the relationship in other respects between the United States and Dunn & Hodgson, it is plain enough that in the purchase of material and supplies the contractor acts simply as the means through which the Government makes its own purchases.

1. *The Terms of the Contract.*—The provisions of the contract as to the purchase of material, supplies and equipment are detailed and explicit. They differ, in almost every respect, from the ordinary lump-sum Government contract. The specific provisions demonstrate, both singly and in the aggregate, that Dunn & Hodgson in the purchase of materials is allowed virtually no independent discretion and simply performs the mechanical work of locating the goods and securing their delivery to the United States. The decision whether to buy and what to buy, is that of the Government; the title passes directly to the United

States; and the burden of payment falls in reality upon the Government alone. The contract provisions may be grouped in the following categories:

(a) *Allowable Purchases*.—Article II of the contract provides a detailed schedule of the items of expenditure for which the contractor will be allowed reimbursement: labor, material, equipment, supplies, fuel, transportation, salaries, rentals of land and equipment, insurance, and applicable taxes. Reimbursement is also allowed for additional items which in the opinion of the Contracting Officer should be included in the cost of the work. (See *supra*, pp. 10-12; R. 52-55.) This carefully defined limitation upon the authority of Dunn & Hodgson to make purchases is inconsistent with any view that the contractor is purchasing the goods for itself rather than the United States.

(b) *Control of Quality*.—The contract retains in the United States full supervision over the quality of materials purchased. Article IV gives to the Contracting Officer the right at any time to inspect work and materials (R. 59). Bonds and insurance policies must be approved by the Contracting Officer (R. 54). All materials, tools, machinery, equipment, and supplies must be inspected and accepted by the Contracting Officer (R. 51). Except as authorized by the Contracting Officer, all materials must be of the best quality;

he may also require that samples be submitted and approved in advance of purchase (R. 51).

(c) *Control of Price.*—The contract contains elaborate provision for full Government control of the amount of every expenditure. The contractor is to be reimbursed for no item until approval of the invoice by the Contracting Officer (R. 57). And no purchase in excess of \$500 is to be made without his *prior* approval (R. 60). Every contract in excess of \$2,000 must be reduced to writing (R. 60). Permits and license fees, and patent royalties, require the advance approval of the Contracting Officer (R. 54); so, too, must he give prior approval to the rental of plant and equipment of a value in excess of \$300 (R. 52) or to its transportation over 500 miles (R. 53), to the cost of bonds and insurance (R. 54), to the reconstruction of damaged or destroyed work (R. 54), and to the allowance for work done in the contractor's general office (R. 54) and for transportation of field forces and expediting production (R. 53). Transportation and travel allowances of employees must be in accordance with Government travel regulations (R. 55). The compensation of field employees of the contractor must be fixed as prescribed in the contract, unless the Contracting Officer in writing approves an increase (R. 64). The contractor must take advantage of all trade discounts, credits, and commis-

sions; if unable to do so he must give notice and an explanation to the Contracting Officer (R. 57). All revenues from the operation of facilities are to be applied to reduce the cost of the work (R. 57).

(d) *Title*.—The contract makes it plain that, from the moment of its purchase, the United States has title to all work and materials. Title to all work, completed or in the course of construction, is in the Government (R. 51). Upon delivery and inspection, title to all materials, tools, machinery, equipment, and supplies vests in the United States (R. 51).⁷ The state erroneously asserts that there was in this case no formal acceptance of the lumber by the Government (see R. 80–81) but apparently does not deny that title went directly to the United States (Br. 38). Title even as to rented plant or equipment vests in the Government when the rental payments equal the valuation of the equipment plus one percent per month of use (R. 56, 52).

(e) *Reimbursement*.—The contract, in Article III, sets up the machinery for prompt reimbursement of the contractor's expenditures by the Government. The original pay rolls and invoices must be transmitted to the Contracting Officer and pay-

⁷ The instructions to the constructing quartermasters emphasize the desirability for prompt reimbursement because title to the property is that of the United States immediately on delivery (R. 102, 105, 111).

ment will be made upon his verification and certification; reimbursement will in general be made weekly (R. 57).

(f) *Direct Government Purchase*.—The contract reserves to the United States the right itself to furnish any material, equipment, machinery or supplies, to pay transportation charges directly, or to pay directly all sums due from the contractor to third persons for labor, materials or other charges (R. 56, 58).

It is impossible, we submit, to read these provisions of the contract as giving to Dunn & Hodgson any independence in making the Government's purchases. They contemplate, in short, that the purchases should be those of the United States and that, simply for convenience, the orders should be placed initially by the contractor, acting on behalf of the United States.

(g) *The Liability to Materialmen*.—Only one provision in the contract points in a different direction. It directs the cost-plus contractor not to "bind or purport to bind the Government" in placing its purchase orders (R. 60). It has only the function of showing excess caution.* The provision has little significance in this case, for the issue is one of constitutional immunity not of contract law, and the inquiry concerns the Govern-

* Even where the agent is authorized to bind his principal, the third person may look only to the agent if he enters the transaction on faith of the agent's credit. *Mechem, Agency* (2d ed., 1914), sec. 1420; *American Law Institute, Restatement of Law of Agency*, sec. 320.

ment's relationship to the transaction, not the remedies of the materialmen against the Government. And there can be no question that the United States could enforce the contract against King & Boozer.* Moreover, the purchase order undoubtedly bound Dunn & Hodgson to pay King & Boozer, and the Government's acceptance left it bound under the contract immediately to reimburse Dunn & Hodgson. The absence of liability to the materialmen, even, if it existed after acceptance by the Government, would imply no more than the insistence of the Government that it place its orders and make its payments for its purchases through the contractor.

2. *The Practice of the Parties.*—The terms and implications of the contract are fully borne out in the practice of the parties. This practice shows that Dunn & Hodgson in the purchase of materials served only to locate the goods to be purchased for the Government, and as its conduit in making payment for the goods.

The sale of lumber on January 17, 1941, is stipulated to be typical of all of the King & Boozer transactions involved in this case (R. 42). It

* Apart from the clause permitting assignment to the Government (R. 60), and apart from the elements of agency in the transaction, the Government would yet have the status of a third party beneficiary capable of enforcing the contract against the promisor. American Law Institute, *Restatement of Law of Contracts*, secs. 136, 138; see, e. g., *Beasley v. Webster*, 64 Ill. 458 (1872); *Smith v. Watters*, 38 Ohio App. 437 (1931); *Micek v. Wamka*, 165 Wis. 97 (1917); *Weinberger v. Van Hessen*, 260 N. Y. 294 (1932).

was made in accordance with an earlier proposal for the sale of prefabricated lumber, which had been submitted to Dunn & Hodgson by King & Boozer; the proposal before acceptance had in turn been submitted by Dunn & Hodgson to the Constructing Quartermaster, the authorized representative of the Contracting Officer, and had been approved by him (R. 42-43).

Not only was the basic proposal approved by the Constructing Quartermaster, but Dunn & Hodgson prior to the January 17 purchase submitted a specific purchase request to the Constructing Quartermaster (R. 43, 77). The instructions to the Constructing Quartermaster, it may be noted, repeatedly emphasize that all purchase orders must be approved in advance (R. 102, 111, 112). When the present purchase order was approved (R. 43, 77), Dunn & Hodgson issued to King & Boozer an order for the lumber, directing that it be shipped to the "United States Constructing Quartermaster at Fort McClellan, Alabama, for account of" Dunn & Hodgson (R. 43, 78). It declared that the order, while it did not bind the Government, was for the benefit of and was assignable to the United States, and conditioned payment upon acceptance of the material by the Government representative (R. 79). It directed the seller to certify that the bill was correct and unpaid, and that it included no state or local sales tax (R. 79-80).

King & Boozer loaded the lumber on to trucks of a common carrier for delivery. At this time it was inspected and accepted by an employee of Dunn & Hodgson and by a representative of the Constructing Quartermaster; they made a "Receiving and Inspection Report" both to Dunn & Hodgson and to the Constructing Quartermaster (R. 43-44, 80-81).

On January 18, 1941, King & Boozer delivered the original invoice to Dunn & Hodgson (R. 44, 81). The contractor submitted a request for payment to the Constructing Quartermaster (R. 44, 82); on January 29, 1941, the Constructing Quartermaster approved it for payment (R. 44, 83) and Dunn & Hodgson thereafter issued its check to King & Boozer (R. 44-45). On February 3, 1941, Dunn & Hodgson submitted a voucher for reimbursement to the War Department, attaching the invoice, the inspection reports, a copy of its purchase order, and the request for purchase as approved by the Constructing Quartermaster (R. 45, 84-86). This was approved both by the Constructing Quartermaster and his Field Auditor (R. 45, 84-85). On February 5, 1941, the voucher was paid through a Government check by the Finance Officer at Fort McClellan (R. 45).

At no point in this transaction did Dunn & Hodgson take any step that was not approved by the Government. The basic proposal, the specific purchase, and the invoice were each in turn ap-

proved by the Constructing Quartermaster. The lumber was inspected and approved by the Government. Title immediately passed to the Government. After approval of the invoice, Dunn & Hodgson paid for the lumber, with its own check, and was promptly reimbursed by a Government check. The lumber after delivery could be used by Dunn & Hodgson only in the performance of its contract, as directed by the Contracting Officer; the Government, on the other hand, could put it to any use which it chose, at Fort McClellan or elsewhere.

It seems wholly clear that Dunn & Hodgson did not buy the lumber for its own account, that it never owned the lumber, and that it advanced its own funds for its purchase only after obtaining assurance that it would promptly be reimbursed by the Government. The contractor, in short, served simply as a means, used for mechanical convenience, through which the United States made its own purchase of lumber.

3. *The Legal Relationship.*—The terms of the contract and the practice of the parties unite to show (a) Dunn & Hodgson bought this lumber only because it was directed to do so by the United States; (b) the contractor in making the purchase was subject to a rigid and far-reaching control both as to quality and as to price; (c) the title to and dominion over the lumber, immediately upon delivery and inspection, was that of the United

States and not that of the contractor; and (d) the Government was obligated to and did promptly reimburse Dunn & Hodgson for the specific cost of the lumber.

These factors show, we think beyond any doubt, that Dunn & Hodgson served simply as a mechanical means through which the lumber was bought by the United States. The authorities are wholly clear that an agency relationship, rather than that of an independent contractor, is created under circumstances which reserve far less control and immediacy of interest to the principal than in the case at bar. American Law Institute, *Restatement of the Law of Agency*,¹⁰ secs. 1 (1), 2 (3), 220; American Law Institute, *Restatement of the Law of Torts*, sec. 403 (a); *Mechem*, Law of Agency (2d ed., 1914), I, sec. 40; *Steffen*, Independent Contractor and the Good Life, 2 Univ. of Chi. L. R. 501, 502; *Gulf Refining Co. v. Fox*, 297 U. S. 381; *Gulf Refining Co. v. Brown*, 93 F. (2d) 870, 874 (C. C. A. 4). Accordingly, whatever the general status of Dunn & Hodgson (see *supra*, p. 85), it seems to have served considerably more

¹⁰ The Restatement in section 1 defines "agency" as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." It defines "independent contractor" in section 2 (3) as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

as a purchasing agent of the United States than as an independent contractor buying the lumber for its own use and its own purposes.

But our case, in truth, rests upon foundations more secure than the conventional classification of legal relationships. Whatever called, whether agent, instrumentality, means, or conduit, the cost-plus contractor does not buy the goods for himself. The United States authorizes the purchase, pays for it, and, as the State seems to recognize (Br. 38), receives title directly from the seller. The contractor simply performs the labor of locating the goods, arranging delivery, and making a number of small payments to different sellers out of the single Government check drawn for weekly reimbursement. It would fly in the face of common sense and of legal teaching to ascribe the purchases in circumstances such as these, to the contractor rather than to the United States.

C. THE GOVERNMENT'S IMMUNITY FROM A VENDEE SALES TAX IS NOT DESTROYED BECAUSE IT PURCHASES THROUGH A COST-PLUS CONTRACTOR

It seems clear, then, that the lumber was purchased from King & Boozer by the United States and not by Dunn & Hodgson. If this premise be accepted, it follows almost without more that the Government's immunity from a vendee sales tax has not vanished because it acts through a cost-plus-a-fixed-fee contractor. From excess of caution, however, we will draw the evident inference in some detail.

1. *The Realities of the Transaction.*—The Government approved, as we have shown, the general agreement with King & Boozer, the specific purchase order, the seller's invoice, and the voucher drawn by Dunn & Hodgson. It inspected the lumber and received title immediately from King & Boozer. The function of the contractor was, in short, little more than that of broker who brought purchaser and seller together and cared for the details of delivery and payment. The transaction differed in no substantial respect from the cases in which the United States had itself obtained and purchased the the lumber and had utilized the cost-plus contractor only to fabricate it into buildings.¹¹

Indeed, the position of the state would be little worse if the Constructing Quartermaster had himself undertaken the negotiations for the lumber and had himself paid for it by check drawn by him upon a special fund.¹² There would be no question, in such a case, that the lumber was bought by the United States even though King & Boozer dealt with an agent or employee rather than with an in-

¹¹ The contract contemplates direct supply by the Government (R. 56); the initial negotiations were conducted on the assumption that the United States would itself supply most of the lumber (R. 125); and in other instances the Government conducted competitive building and directed the contractor to buy from the low bidder (R. 46).

¹² It is not unusual, even at this day, for Government officers to have at their disposal a special account upon which they can draw by their own check amounts to pay the obligations of the United States. See *Gorin v. United States*, Nos. 87-88, October Term, 1940, R. 224, 297-298.

corporeal sovereignty. There would, similarly, be no question that the payment for the lumber, and for the tax if applicable, would be made by the United States even though the check were signed by the Constructing Quartermaster who in turn would account to the United States. The present record presents a situation which is dissimilar only in that the agency through which the Government acts is a partnership, working for a compensation fixed by the job, instead of a person, working for a compensation fixed by the month. The difference is obviously immaterial to the relationship of the United States to the state sales tax.

It is plain enough that Congress, in authorizing the use of cost-plus-a-fixed-fee contracts, viewed the contractor simply as one who would supply management and an organization to accomplish, under the closest supervision, the work of the Government.¹³ It is hardly to be thought that it

¹³ See Hearings before a Special Committee Investigating the National Defense Program, U. S. Senate, 77th Cong., 1st Sess., pursuant to S. Res. 71, p. 34; and the general understanding of members of Congress and officers of the military establishments as reflected in the hearings before: House Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., p. 56; Senate Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., pp. 20, 21; House Appropriations Subcommittee on H. R. 4965, 77th Cong., 1st Sess., pp. 138, 415-416; Hearings before Senate Committee on Naval Affairs Investigating use of Cost-Plus-A-Fixed-Fee Contracts, 77th Cong., 1st Sess., p. 5.

The instructions to constructing quartermasters contemplate that the United States should supply as much of the necessary plant as it could from its own resources (R. 102).

would suppose the Government's immunity from sales taxes to vanish because it hired an organization, instead of a corresponding number of separate individuals, to make its purchases.

2. *The Necessities of Government Operation.*—

A decision that the United States is immune from the state sales tax if it purchases directly but is liable if it purchases through a cost-plus contractor would introduce unnecessary complications into the performance of the Government's work, particularly with respect to the abnormal magnitude and difficulties of the current defense program. We sketch these considerations in order to suggest that if the political and economic decision to waive the Government's immunity be made, it is more properly for Congress than for this Court.

In consequence of the tremendous increase in governmental activity which arose because of the defense program, the United States has been forced to rely to an increasing extent upon the organization and personnel of private industry. That reliance cannot always take the customary form of lump-sum contracts. Congress has, accordingly, authorized a wide use of cost-plus-a-fixed-fee contracts. The authority is contained in some 12 military appropriation acts.¹⁴ The legis-

¹⁴ Act of April 25, 1939, 53 Stat. 590, sec. 4 and Act of August 7, 1939, 53 Stat. 1239, sec. 1, authorize their use outside of the continental United States. Authority is granted to use them within the continental United States by: Act of June 11, 1940, 54 Stat. 265; Act of June 15, 1940, 54 Stat.

lative history of these acts shows that the military establishments recommended their use, and Congress granted the authority, because of the following considerations: The work may be initiated more quickly, since it is unnecessary to draw complete plans and specifications, to advertise for bids and to award the contract before the work starts.¹⁵

400, sec. 4; Act of June 26, 1940, 54 Stat. 599, 608; Act of June 28, 1940, 54 Stat. 677, sec. 2 (a); Act of July 2, 1940, 54 Stat. 712, sec. 1; Act of October 8, 1940, 54 Stat. 965; Act of March 17, 1941, Pub. No. 13, 77th Cong., 1st Sess.; Act of March 23, 1941, Pub. No. 22, 77th Cong., 1st Sess.; Act of May 5, 1941, Pub. No. 29, 77th Cong., 1st Sess.; Act of May 6, 1941, Pub. No. 48, 77th Cong., 1st Sess.; Act of July 25, 1941, Pub. No. 247, 77th Cong., 1st Sess.

¹⁵(1) H. Rpt. No. 76, 76th Cong., 1st Sess., p. 9; (2) Sen. Rpt. No. 667, 76th Cong., 1st Sess.; (3) H. Rpt. No. 1312, 76th Cong., 1st Sess.; (4) H. Rpt. No. 2267, 76th Cong., 3d Sess., p. 5; (5) S. Rpt. No. 1716, 76th Cong., 3d Sess., p. 17; (6) H. Rpt. No. 2257, 76th Cong., 3d Sess., pp. 2-3; (7) S. Rpt. No. 1863, 76th Cong., 3d Sess., pp. 5, 7; (8) Hearings before House Appropriations Subcommittee on H. R. 10055, 76th Cong., 3d Sess., p. 123; (9) Hearings before House Appropriations Subcommittee on H. R. 3981, 77th Cong., 1st Sess., p. 499; (10) Hearings before House Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., p. 293; (11) Hearings before Senate Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., pp. 15, 16-17; (12) Hearings before Appropriations Subcommittee on H. R. 4965, 77th Cong., 1st Sess., pp. 69 et seq., 412; (13) Hearings before Senate Appropriations Subcommittee on H. R. 4965, 77th Cong., 1st Sess., pp. 51-53; (14) Hearings before Senate Committee on Naval Affairs Investigating Use of Cost-Plus-A-Fixed-Fee Contracts, 77th Cong., 1st Sess., p. 1; (15) Representative Vinson, 87 Cong. Rec., Pt. 4, p. 1211; (16) Representative Woodrum, 87 Cong. Rec., Pt. 12, pp. 4944-4947.

The work will proceed more rapidly, since changes in design and procedure may be made with a minimum of delay.¹⁶ The uncertainty of costs and of the nature of the work would result in bids for lump-sum contracts which would be so high that the cost-plus approach, even without the same incentive for economy, would be considerably more economical.¹⁷ Indeed, the contingencies of the future are so uncertain that few if any bids could be obtained for lump-sum contracts.¹⁸ Finally, use of the cost-plus contract promotes secrecy, through eliminating the need of advertising for competitive bidding.¹⁹

In consequence of these factors, cost-plus contracts have been let under the congressional authorization by some ten Government agencies in the aggregate amount of about \$6,800,000,000.²⁰ If state sales and use taxes were applied to the purchases made through the cost-plus contractors, an unanticipated tax burden of perhaps

¹⁶ Items (1), (2), (3), (4), (6), (7), (10), (12), (13), (16), above.

¹⁷ Items (1), (2), (3), (5), (9), (12), (14), (15), above.

¹⁸ Items (8), (10), (15), above.

¹⁹ Items (1), (2), (3) above.

²⁰ The information with respect to the volume of and potential tax liability under cost-plus-a-fixed-fee contracts is tabulated in the separately printed Appendix B (pp. 2, 3, 19), together with a full description of the sources and estimating methods used.

\$28,000,000 would be added to the cost of the contracts now let under the current defense program; and a liability of perhaps \$54,000,000 would be added for expenditures under all cost-plus contracts during the fiscal year 1942.²¹

It may be suggested that the defense program places added burdens upon the states and localities, and that taxation of purchases made through the cost-plus contractor is a means by which to accomplish a rough fiscal justice as between state and nation. But, as we have shown (pp. 38, 70), this is a consideration for Congress and not for the courts to weigh. If, however, the inquiry were made, the suggested conclusion would not seem to result. It may be conceded that the defense program, in terms of housing, policing, and sanitation, has raised costly problems for a number of localities. But, in the first place, there is no guaranty that sales and use tax revenues derived from the United States through the cost-plus contractor would flow to the communities which have been burdened. More conclusively, even if it be assumed that the defense burden should be borne by

²¹ Appendix B, pp. 19-21, 25. If the United States were held liable for vendee sales taxes, contrary to our argument under Point II, the additional liability would be about \$65,000,000 for the fiscal year 1942. Appendix B, pp. 25-26. Also, the separate tax liability with respect to the cost-plus contracts would in this event be increased, giving in that event a total increased liability of about \$137,000,000 for the fiscal year 1942. Appendix B, pp. 18, 20-21, 26.

the national government alone, the defense program has in itself largely increased state and local revenues. These were about 8 per cent greater in 1940, and will be about 15 per cent greater in 1941, than in 1939." Finally, the Lanham Act of July 28, 1941, Pub. No. 137, 77th Cong., 1st Sess., appropriating \$150,000,000 with which to build needed public works in communities unduly burdened by the defense program, indicates a more discriminating way to recompense the local governments.

3. *The Legal Principles.*—As we have shown, the purchases of the cost-plus contractor are really those of the Government, and both common sense and the practical necessities of government operation require, in the silence of Congress, that the United States retain its immunity when its purchases are made through the contractor. The same conclusion is compelled by the decisions of this Court.

In a very large number of cases this Court has held private persons exempt from taxation because in the transaction in question they were acting as an "agent" or an "instrumentality" of the government. Illustrative cases are collected in notes 21-23, *supra*, pp. 56-57. We think that none of the particular decisions can with confidence be said to be good law today. But these cases

²² A comparative table of tax collections by the states in the years 1939, 1940, and an estimate for 1941 is found in Appendix B, pp. 27-28.

nonetheless contain a basic principle which is as sound today as at the date of their decision: the Government itself may not be taxed, even though the formal taxpayer should be a private person. That principle has frequently, we believe, been misapplied and overextended so as to extend a tax immunity which is that of the private person rather than that of the Government with which he deals. But here there is no such possibility.

One need not speculate in this case whether or not the taxpayer will pass on all, part, or none of the tax benefits accruing from immunity. Cf. Mr. Justice Stone, dissenting in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581. For here the cost-plus contractor is not concerned with the tax at all. If it were valid the contractor would pay only on advance approval of the United States and would promptly be reimbursed for the exact amount of his temporary outlay. The tax, in other words, is paid by the Government itself as the real purchaser, and the private person appears only as intermediary, a conduit for the Government's payment. There is, then, no question of private participation in the benefits of tax immunity.

Accordingly, whatever the present standing of the particular decisions cited above, the valid principles underlying them apply with redoubled vigor here, where the tax is in fact laid upon and paid by the Government in making its purchases, and

the cost-plus contractor is neither benefitted by immunity nor harmed by liability. To hold the United States subject to state sales taxes simply because it buys through a cost-plus contractor would require not only a reversal of the many cases cited above but would also require a sharp departure from their hitherto unquestioned premise, that the constitutional or statutory immunities of the United States itself do not vanish if, as it must, it acts through agents.

Trinityfarm Co. v. Grosjean, 291 U. S. 466, and *James v. Dravo Contracting Co.*, 302 U. S. 134, are in no way opposed. The former case sustained a gasoline-use tax, and the latter sustained a gross-receipts tax, as applied to a lump-sum contractor. The Court in each case was careful to point out that the contractor was an independent contractor (291 U. S. at 472; 302 U. S. at 149). The tax in each case was paid by a private person, not by the Government. The gasoline purchased by the Trinityfarm Company was for its own use, and the receipts of the Dravo Company belonged to it and not the Government. In each case an immunity would operate to the immediate benefit of the contractor and the economic advantage would be passed on to the United States only as a somewhat speculative operation of long-run economic forces. See *James v. Dravo Contracting Co.*, 302 U. S. 134, 159-160; *Helvering v. Gerhardt*, 304 U. S. 405, 416-417, 420-421; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483-485, 487.

4. *The Administrative Construction.*—The federal administrative authorities have with almost complete consistency operated on the principle that the purchases of the United States retain their character as government purchases even though made through the cost-plus contractor.

The Bureau of Internal Revenue has ruled ²³ that the purchases made through a cost-plus-a-fixed-fee contractor are exempt from the excise taxes imposed by Chapter 29 of the Internal Revenue Code, because the goods are furnished for the exclusive use of the United States.²⁴ A corresponding ruling was made with respect to the sale of gasoline and lubricating oils,²⁵ the tax on bituminous coal,²⁶ the tax on telephone, telegraph, radio, and cable messages.²⁷ The only ruling to the contrary is one holding that social security taxes may be collected from the cost-plus contractor.²⁸

²³ The informal rulings summarized in this paragraph do not, of course, have the status of Treasury Decisions.

²⁴ Letter of May 1, 1940, from the Commissioner of Internal Revenue to the Chief of Bureau of Yards and Docks.

²⁵ Letter of October 23, 1940, from the Deputy Commissioner of Internal Revenue to the Assistant to the Quartermaster General.

²⁶ Letter of March 24, 1941, from the Deputy Commissioner of Internal Revenue to the Assistant to the Quartermaster General.

²⁷ Letter of August 8, 1941, from the Acting Deputy Commissioner of Internal Revenue to the Office of the Undersecretary of War.

²⁸ S. S. T. 412, Int. Rev. Bull. No. 11, March 17, 1941, p. 5. The ruling is based upon the proposition that the cost-plus contractor is an independent contractor, and thus contradicts

The Comptroller General, in matters such as employment relationships, has viewed the cost-plus-a-fixed-fee contractor as separate from the Government (20 Comp. Gen. 921; cf. 20 Comp. Gen. 196; Pet. Br. 51). But in regard to the purchase of goods, he has always recognized the cost-plus-a-fixed-fee contractor to be simply a means through which the Government makes its own purchases. He has ruled that telegrams connected with the performance of the contract must be accepted at government rates, because the contractor is simply acting for the Government under its close supervision (21 Comp. Gen. 186; cf. 21 Comp. Gen. 92). He has ruled that the contractor, whatever his normal practice, cannot pay travel expenses and subsistence in situations where not allowed under government regulations (21 Comp. Gen. 97). He has ruled that the cost-plus contractor may be reimbursed for losses caused by the negligence of his employees not traceable directly to the contractor; while the syllogism is not clear, the ruling is based upon the proposition that the contractor acts for the Government rather than himself (21 Comp. Gen. 149). Finally, on September 29, 1941, he ruled that, since the cost-plus contractor at least in the purchase of materials was acting for the

the other rulings of the Commissioner listed above. The result, however, is not inconsistent with those rulings because the contract expressly requires payment of social-security taxes (R. 54) and the state legislatures are authorized to collect those taxes from Government instrumentalities not wholly owned by the United States (note 29, *infra*, p. 108).

Government rather than as an independent contractor, he was subject to Government restrictions on the purchase of typewriters (Dec. B-20442, 10 U. S. L. W. 2234).²⁹

The administrative construction by state officials has been less uniform. In 7 states the administrative construction has exempted the cost-plus-a-fixed-fee contractor from state excise taxes;³⁰ in 6 states a qualified exemption has been granted;³¹ in 16 states exemption has been denied;³² and in

²⁹ While he has also ruled that the cost-plus contractor may be reimbursed for the payment of Social Security taxes, this is because of the express authority given to the state legislatures by section 613 of the Act of August 10, 1939, 53 Stat. 1360, 1391, to require any instrumentality of the United States, except one wholly owned by the Government, to pay such taxes. 20 Comp. Gen. 499.

³⁰ *Michigan*: Prentice-Hall, *State and Local Tax Service*, Pars. 47,003, 23,019, and information furnished by the War Department. *Mississippi*: *id.*, Par. 23,073. *Nevada*: Information furnished by the War Department. *North Carolina*: *id.*, Par. 23,039, and information furnished by the War Department. *Ohio*: Information furnished by the War Department; cf. *id.*, Par. 47,006. *Oregon*: *id.*, Pars. 47,006, 47,008, 47,009. *Pennsylvania*: *id.*, Pars. 46,007, 46,008, and information furnished by the War Department.

³¹ *Colorado*: Prentice-Hall, *op. cit.*, Pars. 21,212, 21,422-A. *Iowa*: *id.*, Pars. 23,080, 47,000. *Missouri*: *id.*, Par. 23,057, and information furnished by the War Department. *New Mexico*: *id.*, Pars. 21,500, 21,709. *South Dakota*: *id.*, Pars. 21,251, 47,000; but cf. Par. 23,012. *Wisconsin*: Information furnished by the War Department.

³² *California*: Prentice-Hall, *op. cit.*, Pars. 21,252.9, 23,035. *Delaware*: *id.*, Par. 45,410. *Georgia*: *id.*, Par. 47,004. *Maryland*: *id.*, Par. 45,240.19. *Minnesota*: *id.*, Par. 45,220. *Nebraska*: *id.*, Pars. 47,004, 47,006. *New Hampshire*: *id.*, Par. 45,200.5. *New Jersey*: *id.*, Par. 47,000. *New York*: *id.*,

8 states there has been no clear administrative construction."

In result, the Government is shown to retain its immunity when it purchases through the cost-plus-a-fixed-fee contractor whether one looks at the realities of the transaction, the necessities of government operations, the controlling legal principles, or the uniform federal, and partially consistent state, administrative practice.

D. THERE HAS BEEN NO WAIVER OF IMMUNITY

The state urges (Br. 70-79) that any immunity which would otherwise attach to purchases made through the cost-plus contractor has been waived. The waiver is found in (1) the terms of the contract and (2) the legislative history of the Naval Appropriation Act of 1940. The court below correctly ruled (R. 152-154) that no waiver could be found in either.

Par. 47,001. *North Dakota: id.*, Pars. 23,064, 47,028. *Oklahoma: id.*, Pars. 23,021, 23,923. *Rhode Island: id.*, Par. 45,200.5. *Tennessee: id.*, Par. 47,000. *Vermont: id.*, Par. 47,002. *Virginia: id.*, Par. 27,004. *West Virginia: id.*, Pars. 23,016, 47,000.

³³ *Arizona: Prentice-Hall, op. cit.*, Pars. 21,553, 21,553-A, 47,008. *Arkansas: id.*, Pars. 23,017, 23,015, and information furnished by the War Department. *Idaho: id.*, Pars. 47,010, 47,015, and information furnished by the War Department. *Indiana: id.*, Pars. 21,121, 21,412, 23,046, 23,054. *Texas: id.*, Par 44,162, and information furnished by the War Department. *Utah: id.*, Par. 47,004. *Washington: id.*, Pars. 47,008, 47,022, and information furnished by the War Department. *Wyoming: id.*, Pars. 21,274, 21,274.1, 47,016.

1. *The Tax Clause of the Contract.*--Article II (1) (m) of the contract between the United States and Dunn & Hodgson provides (R. 54) reimbursement to the contractor for--

Payments from his own funds made by the Contractor under the Social Security Act,³⁴ and any applicable State or local taxes, fees, or charges * * *

The contractor, it is to be noted, is to be reimbursed only for "applicable" state and local taxes. The contract contains no indication as to which taxes are applicable and which are inapplicable. Certain taxes, as property taxes on the contractor's own land, plant and equipment, would not be imposed upon the Government itself and would properly be payable even by a cost-plus-a-fixed-fee contractor. Other taxes, such as a tax upon the ownership of material to which the Government had title, would seem plainly inapplicable. The contract, in short, leaves entirely open the question of whether a particular tax is validly applicable.

To the extent that the contract provision might suggest a doubt as to the purpose of the parties, that purpose may be sought in their practice.³⁵ The

³⁴ These taxes are paid under the provisions of an express Act of Congress (note 29, *supra*, p. 108).

³⁵ *Williston*, contracts (1936 ed), sec. 623; American Law Institute, *Restatement of the Law of Contracts*, sec. 235 (e). Even if the State had the position of an incidental beneficiary of the contract, it would be bound by the parties' interpretation. *Tomnitz v. Employers' Liability Assurance Corp., Ltd.*, 343 Mo. 321 (1938); see *Utica Mutual Ins. Co. v. Hemera*, 162 Misc. 169, 176 (1936).

practice under the cost-plus-a-fixed-fee contracts has been entirely uniform: the purchase order forms, supplied by the Government, require the materialmen to certify "that State or local sales taxes are not included in the amounts billed" (R. 80).

Finally, if the Constitution and the statutes contemplate that the United States shall be immune from state sales taxes imposed upon it when it purchases through a cost-plus contractor, it was beyond the competence of the Contracting Officer to waive that immunity. *Royal Indemnity Co. v. United States*, No. 817, October Term, 1940; *Wilber Nat. Bank v. United States*, 294 U. S. 120, 123-124; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409; *Hart v. United States*, 95 U. S. 316, 318; *Whiteside v. United States*, 93 U. S. 247, 256-257.

2. *The Legislative History of the 1941 Naval Appropriation Act.*—By section 4 of the Act of April 25, 1939 (53 Stat. 590, 592) the military establishments were authorized to negotiate cost-plus-a-fixed-fee contracts for certain projects outside of the United States. The Naval Appropriation Act for 1941, approved June 11, 1940, 54 Stat. 265, authorized the Navy Department to negotiate similar projects within the United States. An amendment designed to constitute the cost-plus contractor an agent of the United States and to declare his purchases exempt from state and local taxes was defeated. From this the state draws the

inference that Congress intended the cost-plus contractor to pay state sales taxes. The inference has a superficial plausibility but does not bear close examination.

The Senate Committee on Appropriations, in its second report on the bill (S. Rpt. No. 1654, 76th Cong., 3d Sess.) proposed without explanation an amendment which was adopted by the Senate without debate (86th Cong. Rec. 6681). It provided:

The provisions of section 4 of the Act approved April 25, 1939 (53 Stat. 590-592), shall be applicable to all public works and public utilities projects mentioned in this act: *Provided*, That all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purpose of such contracts and all purchases under such contracts shall be exempt from Federal, State, and local taxes.

The conferees disagreed (86 Cong. Rec. 7519). The House, after general debate, deleted the proviso of the amendment (86 Cong. Rec. 7535) and the Senate concurred without debate (86 Cong. Rec. 7648). The only indication of the congressional intention, then, is found in the House debate.³⁰ There is no discussion in a committee

³⁰ There was a momentary discussion during the Senate hearings which is not illuminating. See Supplemental Hear-

report, there is no statement by a chairman of a committee, and there is no statement by a sponsor of the legislation. Under ordinary standards of statutory construction, the debate cannot be examined in the attempt to determine the congressional purpose. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 494; *Duplex Co. v. Deering*, 254 U. S. 443, 474; *Lapina v. Williams*, 232 U. S. 78, 90; *United States v. Freight Assn.*, 166 U. S. 290, 318.¹⁷

The wisdom of this rule is abundantly illustrated by the confusing and contradictory implications to be drawn from the House debate. Eleven members of the House participated in the debate. Two favored acceptance of the Senate amendment because the cost-plus contractor purchased for the account of the United States and the exemption from taxation of the purchases would merely secure to the Government its normal immunity.¹⁸ The nine members who opposed the amendment did not declare that state sales taxes should be collected upon sales to the cost-plus contractor.

ing, Navy Department Appropriation Bill for 1941 (or H. R. 8438), before the Senate Subcommittee, 76th Cong., 3d Sess., pp. 20, 21.

¹⁷ There was, as we show below, no such general understanding as would permit the Court to extract the sense of the Congress from the unanimity of individual expression. Cf. *United States v. San Francisco*, 310 U. S. 16, 22, and cases cited.

¹⁸ Representatives Scrugham and Maas, 86 Cong. Rec. 7532, 7534, 7535.

Whatever the basis for their objections in the actual amendment before the House, it is sufficient that they were not directed to the issue of sales taxes on purchases made through the cost-plus contractor. It was feared that designation of the contractor as agent would empower him to bind the Government," would subject the Government to damage claims for acts of the contractor," and would require the contractor to observe Government purchasing regulations and rates of pay and hours of work specified for Government employees and would forbid his employees to strike.⁴¹ Other representatives feared that the amendment would serve to exempt the cost-plus contractor from a variety of taxes to which he plainly would and should be liable,⁴² and one without elaboration declared his fear that it would destroy states' rights.⁴³

⁴⁰ Representatives Vinson and Massingale, 86 Cong. Rec. 7533, 7534.

⁴¹ Representatives Vinson and Darden, 86 Cong. Rec. 7533, 7534, 7535.

⁴² Representatives McLeod, 86 Cong. Rec. 7533.

⁴³ Federal income taxes (Representative Cole, 86 Cong. Rec. 7533); state income, business and franchise taxes (Representative McLeod, 86 Cong. Rec. 7533); federal and state social security taxes (Representatives Cole and Fitzpatrick, 86 Cong. Rec. 7533, 7534); property taxes on land owned by the contractor (Representative Dondero, 86 Cong. Rec. 7534); property taxes on material owned by the contractor (Representative Vinson, 86 Cong. Rec. 7533, 7534). See also Representative Vorys, objecting that the contractor would get *all* of the immunities of the United States yet retain his profit (86 Cong. Rec. 7534).

⁴⁴ Representative Ditter, 86 Cong. Rec. 7534.

One representative, it is true, included a sales tax in his catalog of taxes from which the cost-plus contractor would improperly be exempted by the amendment," but even if full weight be given to this inclusion, his views are opposed by those of the two members who spoke in favor of the amendment.

In view of the variety and the general irrelevance to the present issue of the objections offered to the amendment, no weight can in this case be attached to the legislative history of the Naval Appropriations Act of 1940.

3. *The Legislative History of the Act of June 15, 1940.*—The Act of June 15, 1940, 54 Stat. 400, authorizing the construction of naval aircraft and works, produced a somewhat analogous legislative episode. The bill in section 4 authorized the use of cost-plus-a-fixed-fee contracts. The Senate agreed, without debate, to a committee amendment, proposed without explanation (S. Rpt. No. 1716, 76th Cong., 3d Sess.), which provided broadly that the cost-plus contractors "shall be held to be agents of the United States for the purposes of such contracts" (86 Cong. Rec. 7448).⁴⁵ The pro-

⁴⁵ Representative McLeod, 86 Cong. Rec. 7533.

⁴⁶ The amendment doubtless reflects the request before the Senate Naval Affairs Committee by naval officers for express immunity from state sales taxes as applied to the purchases made through a cost-plus contractor. Senator Ellender at that time was dubious. He did not understand why the provision was necessary to ensure the immunity, since the material belonged to the Government on its purchase, and feared that if adopted the amendment would cause the Navy

vision was eliminated in conference. Representative Vinson, reporting to the House, stated " (86 Cong. Rec. 7956) :

The only matter of consequence in conference was the Senate amendment making contractors the agents of the Government. I am happy to state to the House that the Senate receded on that amendment, and, therefore, the position of the House has been maintained that these contractors should not be agents of the Government.

There was no debate in the House and the Senate concurred without debate (86 Cong. Rec. 7837).

From this history one can gather that the Senate, probably to ensure the retention of the Government's immunity from sales taxes, was prepared to give the cost-plus contractor the status of an agent. The House was not willing to give the cost-plus contractor such a status. This reluctance, not explained, by no means infers that the House wished the Government's immunity from sales taxes to vanish. As Senator Ellender

to "experience difficulties under the law of principal and agent." Hearings before Senate Naval Affairs Committee on S. 4024 [for which H. R. 9848 was substituted], 76th Cong., 3d Sess., pp. 47-48.

"The conference report stated (86 Cong. Rec. 7955) :

"This amendment restores the House language and places contractors with a fee contract on the same basis as all other contractors doing business with the United States. It removes the language which states such contractors shall be held to be agents of the United States."

indicated in the Senate hearings (note —, *supra*, pp. 115–116), the House may have felt that the immunity would exist in any event and that the relationship of principal and agent would result in other and undesirable consequences. At the most, the views of the House cannot be assumed to be any more relevant to the question here in issue than was the closely contemporaneous debate on the Naval Appropriations Act of 1941, discussed in detail above (pp. 113–115).

It is always hazardous to construe congressional silence, in contrast to congressional action, by reference to legislative history. This is doubly so when it is remembered that Congress, when it chooses to waive a tax immunity, has frequently done so by express enactment (*supra*, n. 43, pp. 72–73). And, Congress may be supposed to have acquiesced in the present administrative practice (*supra*, pp. 106–108).

Neither the contract, then, nor the legislative history of the two acts discussed above indicates any intention whatever to waive the immunity which otherwise would obtain when the United States makes its purchases through the cost-plus-a-fixed-fee contractor. Certainly, nothing meets the test that “The waiver must be clear, and every well-founded doubt upon the subject must be resolved in favor of the exemption.” *Austin v. The Aldermen*, 7 Wall. 694, 699; see also *Farmers Bank v. Minnesota*, 232 U. S. 516, 528.

CONCLUSION

The Alabama sales tax is imposed on the buyer. The United States in making its purchases is immune from a state sales tax laid upon the buyer. Government's immunity is not lost because it acts through a cost-plus-a-fixed-fee contractor. The Alabama sales tax, therefore, cannot be imposed upon the purchases made by the United States through the contractor. It is accordingly respectfully submitted that the decision below should be affirmed.

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OCTOBER 1941.

APPENDIX A

Military Appropriation Act, 1941, approved
June 13, 1940, 54 Stat. 350, 360-361:

MILITARY POSTS

For construction and installation of buildings, flying fields, and appurtenances thereto, including interior facilities, fixed equipment, necessary services, roads, connections to water, sewer, gas, and electric mains, purchase and installation of telephone and radio equipment, and similar improvements, and procurement of transportation incident thereto, without reference to sections 1136 and 3734, Revised Statutes (10 U. S. C. 1339; 40 U. S. C. 267); general overhead expenses of transportation, engineering, supplies, inspection and supervision, and such services as may be necessary in the office of the Quartermaster General; and the engagement by contract or otherwise without regard to section 3709, Revised Statutes (41 U. S. C. 5), and at such rates of compensation as the Secretary of War may determine, of the services of architects or firms or corporations thereof and other technical and professional personnel as may be necessary; \$90,310,785, to remain available until expended, and, in addition, authority is hereby given to enter into contracts, prior to July 1, 1941, for the same purposes to an amount not in excess of \$6,000,000: *Provided*, That the foregoing appropriation and contract authorization shall be applied as follows:

* * * emergency construction, \$47,976,-

962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1339; 40 U. S. C. 255); * * *.¹

Act of July 2, 1940, 54 Stat. 712:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, un-

¹ Supplemental appropriations are found in the Act of June 26, 1940, 54 Stat. 599, 602; the Act of September 9, 1940, 54 Stat. 872, 873; the Joint Resolution of September 24, 1940, 54 Stat. 958; and the Act of October 8, 1940, 54 Stat. 965, 967-968.

serviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Laws of Alabama, 1939, Act. No. 18, p. 16:

SECTION II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license

tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm, or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. * * *

SECTION IV. If any person, on or after the passage of this act, shall engage in or continue in any business for which a privilege tax is imposed by Section II of this Act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the department a license to engage in and to conduct such business for the current tax year upon the condition that he shall pay the taxes accruing to the State of Alabama under the provisions of this Act, provided, however, that no license shall be issued under the provisions of this Act to any person who has not complied with the provisions of this Act, and no provision of this Act shall be construed as relieving any person from the payment of any license or privilege tax now or hereafter imposed by law.

SECTION V. EXEMPTIONS.—There are, however, exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under

this Act the following: (a) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b) The gross proceeds of sales of tangible personal property to the State of Alabama, to the counties within the State, and to incorporated municipalities of the State of Alabama. (c) The gross proceeds of the sales of lubricating oil and gasoline * * *. (d) The gross proceeds of the sales of textbooks used in elementary schools, high schools, and institutions of higher learning. (e) The gross proceeds of sales of alcoholic and/or cereal beverages, * * *. (f) The gross proceeds of sales of livestock, poultry, and other products of the farm, dairy, grove, or garden, when in the original state of production or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof. * * *. (g) The gross proceeds of the sale, or sales, of fertilizer. * * *. (h) The gross proceeds of the sale, or sales, of seeds for planting purposes. * * *. (i) The gross proceeds of the sale, or sales, of boxes, crates, bags, bagging, ties, barrels, or other containers, and the labels thereof used in preparing agricultural products, dairy products, grove or garden products for market, * * *. (j) The gross proceeds of the sale, or sales, of newsprint paper, newspapers, and religious publications. (k) The gross proceeds of the sale, or sales, of coal or coke to manufacturers, electric power companies, and

transportation companies for use or consumption in the production of byproducts, or the generation of heat or power used, (1) in manufacturing tangible personal property for sale, * * * (l) The gross proceeds of the sale, or sales, of those articles containing tobacco, * * * (n) The gross proceeds of the sale or sales of railroad rails, railroad cars, and vessels and barges of more than fifty tons burden, when sold by the manufacturers or builders thereof. (o) The gross proceeds of the sale or sales of lunches to school children when such sales are made within school buildings and are not for profit. (p) The gross proceeds of sale or sales of used automotive vehicles. (q) The gross proceeds of sales or gross receipts, of or by, any person, firm, or corporation, from the sale of transportation, gas, water, or electricity, of the kinds and natures, the rates and charges for which, when sold by public utilities, are customarily fixed and determined by the Public Service Commission of Alabama or like regulatory bodies. (r) The gross proceeds of the sale of machines used in mining, quarrying, compounding, processing, and manufacturing of tangible personal property. * * *

SECTION VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department,

a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. * * *

SECTION VII. Any person taxable under this Act, having cash and credit sales may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collections of such credit sales shall have been made.

SECTION VIII. On or before thirty (30) days after the end of the tax year, each person liable for the payment of a privilege tax levied by this Act shall make a return showing the gross proceeds of sales or gross receipts of business, and compute the amount of tax chargeable against him in accordance with the provisions of this Act, and deduct the amount of monthly or quarterly payments as hereinbefore provided, if any have been made, and transmit with his report a remittance in the form required by this Act covering the residue of the tax

chargeable against him, to the office of the Department, and such report shall be verified by oath, as herein required.

SECTION IX. KEEPING RECORDS. It shall be the duty of every person engaging, or continuing, in this State in any business for which a privilege tax is imposed by this Act, to keep and preserve suitable records of the gross sales, gross proceeds of sale, and gross receipts and/or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this Act. * * *

* * * * *

SECTION XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

SECTION XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months. Each month of failure to make such reports shall constitute a separate offense, and each

refusal of a written demand of the Department to examine, inspect, or audit such records shall constitute a separate offense.

SECTION XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) percent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one ($\frac{1}{2}$ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

* * * * *

SECTION XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears

that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten (10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one ($\frac{1}{2}$ of 1%) percent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a willful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) percent of the tax. Provided that upon appeal such action shall be reviewable.

SECTION XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgment of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. * * *

SECTION XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made,

he may appeal in all respects in the same manner provided by Act No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final. Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

SECTION XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

SECTION XX. If any final assessment of taxes herein levied be not paid within fifteen (15) days after such assessment becomes final if no appeal has been taken, in cases where an appeal is authorized, the Department shall issue an execution therefor directed to any Sheriff of the State of Alabama commanding him to levy upon and sell the real and personal property of the person against whom such execution is directed, found in his county, together with all penalties assessed. * * *

SECTION XXI. The tax herein levied shall constitute a debt due the State of Alabama and may be collected by civil suit in addition to the methods herein provided.

* * * * *

SECTION XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount

due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

SECTION XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty (\$50.00) Dollars nor more than One Hundred (\$100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

SECTION XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this Act.

* * * * *

SECTION XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no dis-

count shall be authorized or allowed upon any taxes which are not paid before delinquency, as in this Act provided.

SECTION XXXVII. (a) The Department, if it deems it necessary, in order to facilitate the collection of the tax or any other amount required by this Act, may provide by rule and regulation for issuance, sale, and redemption of tax tokens in denominations of one mill and five mills. The Department may purchase such number of tokens in each denomination as may be found necessary. Any tokens authorized to be issued by said Department shall be sold at face value by the Department and shall be subject to redemption by the Department at face value, under such rules and regulations as the Department may promulgate. Such tokens, if authorized, shall be received by the Department or person liable for taxes hereunder in the payment of any tax or other amount required under this act where such tax or other amount is a fractional part of one cent. * * *

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CLERK

No. 602

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE STATE OF ALABAMA, PETITIONER

v.

**KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM
COBB KING AND SIMON ELBERT BOOZER, RESI-
DENTS OF CALHOUN COUNTY, ALABAMA, AND THE
UNITED STATES OF AMERICA, INTERVENER**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF ALABAMA**

BRIEF FOR THE UNITED STATES

APPENDIX B

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(I)

APPENDIX B

AN ESTIMATE OF TAX BURDENS

A statistical inquiry into the economic advantages of tax immunity and the economic costs of tax liability has only a limited relevance to the issues now before the Court. Such an inquiry may produce results which have much utility for Congress, but the economic study cannot go far to resolve the questions of constitutional implication now before the Court. Yet we have suggested, in the text of our brief, to underscore our view that a waiver of immunity should be left for Congress, that the Court should consider the practical consequences of a decision that the United States loses its immunity from vendee sales taxes when it purchases through a cost-plus-a-fixed-fee contractor (pp. 99-103). And the discussion of the legal problem has evoked numerous rough estimates of the volume of tax liability which is involved. Accordingly, a more exact estimate has been attempted.

In addition to the problems of the cost-plus contracts we have attempted an estimate of the tax liability involved with respect to the purchases of the United States made directly by the various Departments and agencies of the Federal Government.

Finally, we have incorporated statistics showing the comparative amounts of state tax collections during recent years, in an effort to determine the validity of any suggestion that immunization of cost-plus

contractors would result in an undesirable impairment of state revenues.

Even the most accurate of the estimates cannot be regarded as a measure of the future; both the work being accomplished through cost-plus-a-fixed-fee contracts, and the purchases being made by the Government are constantly increasing in volume and varying in character; material costs and wage rates are rising; and the state-taxing statutes themselves are subject to legislative change.

I

TAXES ON FEDERAL PURCHASES UNDER COST-PLUS-A-FIXED-FEE CONTRACTS ¹

Since June 1, 1940, the exigencies of the national-defense program have led ten Government Departments and agencies, in connection with that program, to execute more than 600 cost-plus-a-fixed-fee contracts.²

The contracts are for three types of services: (1) architectural engineering,³ (2) construction,⁴ and

¹ The study embraces only contracts in amounts exceeding \$10,000.

² War Department, Navy Department, Maritime Commission, Public Buildings Administration, Defense Homes Corporation, Defense Plant Corporation, Metals Reserve Corporation, Bureau of Mines, Civil Aeronautics Authority, Farm Security Administration.

³ Preparation of necessary estimates, surveys, designs, drawings, and specifications; consultation with and advice to Contracting Officer and contractor on questions regarding construction in accordance therewith.

⁴ Construction of tent camps, replacement centers, cantonments, hospitals, air bases, housing facilities, miscellaneous troop facilities, ammunition depots, ordnance manufacturing plants, plane factories, ship yards, and ships, naval and commercial.

(3) supply and equipment.⁵ The first group is inconsequential in the present estimate of taxes; the amounts of the contracts are small and the fixed fees, the taxation of which is not now questioned, comprise a large part of the total expenditure.⁶ The second group embraces the greatest portion of the total defense expenditures to date through the cost-plus-a-fixed-fee contract. In the third category the total value of the contracts which have been executed exceeds those in the first and second combined, but the majority of them are in the early stages of performance, and actual expenditures to date are relatively low.⁷

The most accurate figures for computation of probable taxes are available as to construction contracts, and the results of the estimate of taxes on this group is, therefore, presented separately, after analysis of the state tax statutes.

⁵ Manufacture of planes, motors, tanks, armor plate, guns, gun mounts, shells, powder, small arms, small arms ammunition, etc.

⁶ The bulk of all cost-plus-a-fixed-fee architectural and engineering contracts were executed on projects being conducted under the supervision of the Quartermaster General of the War Department, totaling 151 in number and \$74,675,099 in value as of Sept. 12, 1941. The average proportion of fee to reimbursable costs is roughly 25%. The remainder is largely salaries and wages, subject only to gross-income taxes in a few states and the tax on the amounts allocable to these states is inappreciable in computation of taxes on a construction program costing more than six billions of dollars.

⁷ These contracts compose only a part of army and navy supply contracts. Others, on a lump-sum basis, are well along in performance.

A. THE STATE AND LOCAL TAX STATUTES

The state tax statutes used in estimation were chiefly those imposing general sales taxes,⁸ gross receipts taxes, contractor's license taxes, and taxes on motor fuels. Three territorial tax laws and a Philadelphia Ordinance taxing gross receipts are included.⁹ All were selected and classified in conformity with the position taken in the present cases that statutes which impose taxes upon the vendee or consumer may not be applied to purchases by cost-plus-a-fixed-fee contractors. Each was examined to determine whether it was designed to levy a tax upon the seller or the consumer, and in this respect was placed in one of three categories: (1) taxes which the state legislature has imposed upon

⁸ Use taxes which are complementary to general retail sales taxes or to taxes on the sale of motor fuels were not considered separately. The retail sales-tax rates were applied to both interstate and intrastate purchases made by contractors in states having both retail sales tax and use tax statutes. In the four states which have a sales tax but no complementary use tax, special reports were obtained from all construction contractors (with the exception of 3 of the 8 in Illinois) as to the percentage of material purchases which were made entirely within the state. The percentages for each state were averaged, and applied to total material purchases of all contractors in the state. The resultant figure was multiplied by the state sales-tax rate. Arkansas, Illinois, Missouri and West Virginia. Motor-fuel sales taxes were applied to all purchases of such products irrespective of the existence or nonexistence of a complementary use-fuel-tax statute, since all but an insignificant amount were intrastate.

⁹ No attempt was made to include local sales-tax laws, such as those in New York City and New Orleans, since we are without information as to the volume of purchases made therein.

the vendee,¹⁰ (2) taxes which cannot presently be classified under available standards as either vendor or vendees taxes,¹¹ and (3) taxes which the legislature has imposed upon the vendor without requirement or with no more than a suggestion that such

¹⁰ This category includes statutes which by their terms levy a tax initially upon the vendee; statutes which require that the tax be paid by the vendee, although it is collected by the state through the vendor; statutes which have been construed by state administrative authorities or the state courts as levying a tax upon the vendee; statutes which permit the vendee to obtain refunds of taxes or to maintain suits for recovery thereof (even though the vendee may be required to show that he has paid the tax directly or through addition of the amount of the tax to the sales price). The statutes are listed *infra*, Divisions I (a) and I (b), pp. 29-33.

¹¹ This category includes statutes which initially levy a tax upon the vendor but prohibit the vendor from advertising absorption of the tax, require that the tax be billed to the vendee separately from the purchase price, provide that sums received by vendors from vendees through addition of the amount of the tax to the purchase price shall be considered as funds held in trust for the state, and permit the vendee to deduct from amounts paid to the state the amounts of losses suffered through uncollectible accounts. When combined with conflicting indicia that the tax was on the vendor, the presence of a majority of these features was thought to render classification of the tax as either a tax upon the vendee or the vendor unprofitable at this time. Administrative or judicial construction of the statute by state officials or courts as a tax upon the vendor were not accepted as conclusive, although, as stated above in footnote 10, the contrary construction was accepted. In the latter case the construction presents no conflict with the position taken by the Government that taxes on vendees are not applicable to purchases of cost-plus-a-fixed-fee contractors and there is,

taxes be passed on to the purchaser.¹² This classification was made with reasonable care but the result, as to any particular statute, is necessarily tentative.

Many of the statutes in all three categories contain express exemptions of sales to the United States or its instrumentalities or agencies (or provide for refunds, upon application, of taxes paid as to such sales). Accordingly, the taxes in each of the three were subdivided into two groups; those with and those without such exemptions.¹³ Three state legislatures and one territorial legislature have made such exemptions specific as to sales to cost-plus-a-fixed-fee

consequently, no ground for questioning a construction by the states which is based upon reasons satisfactory to themselves. On the other hand the policy of not resisting taxes levied upon vendors requires examination of statutes construed as such to determine whether the construction is warranted by the terms of the act. See *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41. The statutes are listed *infra*. Divisions II (a) and II (b), p. 33.

¹² This category includes statutes which expressly levy a tax upon the vendor and contain none, or very few, of the provisions referred to in footnotes 10 and 11, *supra*. The statutes are listed *infra*, Divisions III (a) and III (b), pp. 33-35.

¹³ Statutes with exemptions appear under subdivisions I (a), II (a), and III (a), *infra*, pp. 29-31, 33-34; those without exemptions appear under subdivisions I (b), II (b), and III (b) *infra*, pp. 31-33, 34-35; provisions for exemption of "sales which the State is prohibited from taxing under the Constitution and laws of the United States" and provisions similarly worded are not considered exemptions for the reason that they do not operate of themselves to exclude any specific sales.

contractors.¹⁴ Six other states whose statutes have no express exemptions have exempted sales to cost-plus-a-fixed-fee contractors by administrative ruling that such sales are immune from state taxation under the Constitution of the United States.¹⁵

On the other hand 15 states whose statutes contain express exemptions of sales to the United States, its agencies or Departments, have taken the position that sales to cost-plus-a-fixed-fee contractors do not fall within this exemption and have sought collection of the tax.¹⁶ At least one state has attempted by specific legislative declaration to exclude sales to cost-plus-a-fixed-fee contractors from an existing statutory

¹⁴ *Kansas*, Motor Fuels Tax; *Minnesota*, Tax and Fee on Motor Vehicle Fuels; *Missouri*, Motor Vehicle Fuel Tax; *Puerto Rico*, Excise Tax on Motor Fuels. The North Carolina Wholesale and Retail Merchants' Sales Tax Act exempts sales of property which enter into any building or structure erected or constructed under any contract with the United States.

¹⁵ *Idaho*, Motor Fuel Tax; *Iowa*, Retail Sales Tax, Motor Vehicle Fuel Tax; *Kansas*, Retailers Sales Tax; *Massachusetts*, Motor Fuels Tax; *Michigan*, Gasoline Tax; *Ohio*, Retail Sales Tax; *South Dakota*, Retail Occupation Sales Tax, Motor Vehicle Fuel Tax.

¹⁶ *Alabama*, Gasoline Tax; *California*, Motor Vehicle Fuel License Tax; *Georgia*, Motor Fuel Tax; *Illinois*, Motor Fuel Tax; *Louisiana*, Gasoline Tax; *Mississippi*, Gross Sales Tax, Gasoline and Oil Tax; *Missouri*, Motor Vehicle Fuel Tax; *Nebraska*, Gasoline Tax; *New Jersey*, Gasoline Tax; *North Dakota*, Gasoline Tax; *Pennsylvania*, Liquid Fuel Tax; *Texas*, Motor Fuel Tax; *Virginia*, Motor Fuel Tax; *Washington*, Business and Occupation Tax, Motor Vehicle Fuel Tax; *Wyoming*, Selective Sales Tax.

exemption of sales to the United States or instrumentalities.¹⁷

In view of this confusion and because of the possibility that many statutory and administrative exemptions will be withdrawn if constitutional impediments are removed, the presence of exemptions is not thought important in estimating the cost of state taxes upon the Federal Government. Should it now appear that such sales are within reach of state taxation, state authorities in many instances will be compelled by law to collect taxes upon them, when such collection is not barred by lapse of the period within which assessments are allowed. Accordingly the tax figures tabulated hereafter in this Appendix do not reflect the existence of any exemptions of the United States from state taxes. However, the complete results of the classification are shown as follows:

¹⁷ California, Sec. 5.1 of the Retail Sales Tax Act of 1933, as amended, provides: "There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed, or payable hereunder the gross receipts from the sale of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or a corporate instrumentality."

By an act effective June 11, 1941, the act was amended as follows:

"SECTION 1. A new section, to be numbered 5.3, is hereby added to the Retail Sales Tax Act of 1933, to read as follows:

" 'SEC. 5.3. Notwithstanding any other provisions of law the tax imposed under this act shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property.' "

	Sales ¹¹	Gross Receipts ¹²	License ¹³	Motor Fuel ¹⁴	Total
Taxes on vendees with exemption.....	6	3	1	23	33
Taxes on vendees without exemption.....	9	4	5	16	34
Taxes unclassified with exemption.....	1			1	2
Taxes unclassified without exemption.....	2			1	3
Total ¹⁵	18	7	6	41	72
Taxes on vendors with exemption.....				6	6
Taxes on vendors without exemption.....	4	1		8	13
Total.....	22	8	6	55	91

¹¹ Includes taxes measured by gross receipts from sales of tangible personal property at retail. Use taxes at same rates were not considered separately.

¹² Includes taxes measured by gross receipts on account of labor or by entire gross receipts less gross receipts on account of tangible personal property on which retail sales tax is imposed. Taxes measured by gross receipts on account of pay-roll reimbursements to cost-plus-a-fixed-fee contractors are not, strictly speaking, "vendor" or "vendee" taxes. They are classified as "vendee" taxes since they are taxes levied upon the contractor directly.

¹³ Includes taxes levied directly on contractors, in a fixed sum or graduated according to the total amount of the contract. Again the "vendor" and "vendee" terminology is descriptively inexact, but license taxes are placed in the "vendee" category, since they are levied directly upon the contractor.

¹⁴ Includes taxes levied specifically upon gasoline and other motor fuels. The insignificance in rate and number of taxes on lubricating oil and kerosene, together with the relatively low total value of purchases of these products, made omission thereof appear advisable. For identical reasons gasoline inspection taxes were omitted.

¹⁵ The total of vendee and unclassified taxes is taken as the possible number of the taxes not applicable to cost-plus-a-fixed-fee contractors.

B. CONSTRUCTION CONTRACTS

The Division of Construction and Public Employment in the Bureau of Labor Statistics, Department of Labor, receives monthly from each contractor and each subcontractor on construction projects a report of expenditures for labor and materials.²³ The

²³ No such reports were received from contractors and subcontractors with the Bureau of Mines. The total value of these six contracts is only \$434,300, and they are not included in our figures. No reports were received on one contract in Iowa; the expenditures shown therefor are entirely estimated. Delay by a few contractors in submission of reports required that estimates be used as to less than 5.5% of expenditures for labor and 8% of expenditures for material, during May 1941. The late reports have substantiated these estimates, reducing the total percentage of estimates to well under 5%.

material reports are itemized in detail, permitting allowance for the exemptions of certain materials provided by some sales tax acts, or the application of different rates and special taxes on particular items.²⁴

From these sources the Bureau of Labor Statistics prepared tables showing the expenditures for labor, materials, rentals and insurance, and petroleum products by all the cost-plus-a-fixed-fee prime contractors, cost-plus-a-fixed-fee subcontractors and lump-sum subcontractors in each state from June 1, 1940, to June 15, 1941.²⁵ These tabulations permitted the elimination of all expenditures by lump-sum subcontractors from our estimate.²⁶ A summary

²⁴ For example Mississippi levies a tax of 2% on the gross income of producers of limestone, sand, gravel, or other minerals, a tax of 1% on the gross income of manufacturers of brick, building tile, cement, clay products, and a tax of 1% on the gross income of contractors, except income arising from sales of materials which become a component part of any structure and which are reported by the seller of the materials; other examples are found in the New Mexico Emergency School Tax Act and the North Carolina Wholesale and Retail Merchants' Sales Tax Act of 1939.

²⁵ The reports are submitted to the Bureau confidentially. Figures were furnished by the Bureau in state totals only, or were supplied anonymously in those instances where individual tabulations were required for computation of license taxes graduated according to the amount of the individual contracts.

²⁶ Expenditures by lump sum subcontractors are included indirectly in computation of taxes upon the cost-plus-a-fixed-fee principal contractor in states having a gross receipts tax upon principal contractors measured by the full amount of the principal contracts. In all other cases expenditures by lump-sum contractors are excluded.

table of major items appears as Table I, *infra*, pp. 36-37.

On June 15, 1941, the work on only a few contracts had been completed; the remainder were in various stages of performance. Estimates of the total cost of completion of each unfinished contract were furnished by the respective Departments or agencies with whom such contracts were in effect. From these the Bureau of Labor Statistics prepared itemized estimates of the expenditures for labor, materials, rentals and insurance, and motor fuels necessary to complete each contract, on the basis of past performance on the individual contracts and ratios derived from long experience with comparable construction contracts. All doubts were resolved in favor of the more conservative figure and the Bureau of Labor Statistics states that the margin of error in the estimates of expenditures on this group of contracts is probably less than 10 percent.

The totals of these estimated expenditures for labor, materials, and motor fuel were tabulated by states in the same form as those prepared for actual reported expenditures to June 15, 1941, and a summary of them appears as part of Table I, *infra*, pp. 36-37.

Possible taxes were then computed by multiplying the items taxable under each state statute by the

applicable tax rate.²⁷ The results of these computations appear as Table IV, *infra*, pp. 42-43; for our purposes they may be summarized, as to all but motor-fuel taxes, as follows:

Estimated sales, gross receipts, and license taxes in connection with the activities of cost-plus-fixed-fee contractors and cost-plus-fixed-fee subcontractors on 405 construction contracts

Classification of tax	Expenditures to June 15, 1941	Estimated expenditures to completion	Total
Taxes on vendees	\$4,090,090	\$6,144,876	\$10,234,936
Taxes unclassified	1,684,671	3,413,883	5,098,554
Total	5,774,731	9,558,759	15,333,490
Taxes on vendors	839,515	944,740	1,784,255
Grand total	6,614,246	10,503,499	17,117,745

²⁷ With some variations called for by individual statutes the general procedure was as follows: (1) In each state having a sales and use tax the total expenditures by cost-plus-a-fixed-fee contractors and cost-plus-a-fixed-fee subcontractors for taxable items of tangible personal property, excluding petroleum products, were multiplied by the rates fixed by the state law. In the four states having no complementary use tax only expenditures for the proportion of purchases reported or estimated by contractors as having been made within the state were used. It has, of course, been impossible to take account of all administrative interpretations defining "retail sales," and "gross income." We have done so to the best of available information and insofar as time permitted. (2) In each state having a gross receipts tax the total amounts of all expenditures by cost-plus-a-fixed-fee contractors and cost-plus-a-fixed-fee subcontractors, including expenditures for rentals and insurance, but less expenditures for petroleum products and materials subject to sales tax, or other items exempted by the individual acts, were multiplied by the tax rate. (3) In each state having a contractor's license tax the license taxes due on each cost-plus-a-fixed-fee contract and each cost-plus-a-fixed-fee subcontract under the state schedule were added to obtain the total license taxes for each state.

In the monthly reports received by the Bureau of Labor Statistics only the total dollar value of the expenditures for petroleum products was reported, affording no basis for computation of motor-fuel taxes, which are measured in terms of gallons. Therefore, itemized statements of unit amounts, and the value of each, of the various types of such products purchased by cost-plus-a-fixed-fee contractors and cost-plus-a-fixed-fee subcontractors on a number of representative contracts were obtained directly from them by the respective Departments or Agencies with whom their contracts were executed.²⁸ From these special reports and ratios obtained therefrom the Bureau tabulated, by States, the purchases of gasoline and other motor fuel by the contractors and subcontractors between June 1, 1940, and June 15, 1941, in terms of value and units. In addition, the purchases to be made from June 15, 1941, to completion of each contract were estimated on the basis of experience ratios and tabulated separately. The result appears as Table II, *infra*, pp. 38-39.

Possible taxes were then computed by multiplying the number of taxable units by the rate in each state. The results appear by states in Table IV, *infra*,

²⁸ The number and distribution of the contracts as to which reports were obtained is as follows: War Department, 77; Navy Department, 137; Federal Works Agency, 20.

pp. 42-43. For our purposes they may again be summarized here as follows:

Estimated taxes on purchases of gasoline and other motor fuels by cost-plus-fixed-fee contractors and cost-plus-fixed-fee subcontractors on 405 construction contracts

	Expenditures June 1, 1940, to June 15, 1941	Estimated expenditures June 15, 1941, to completion	Total
Taxes on vendees	\$1, 486, 240	\$5, 867, 891	\$7, 354, 131
Unclassified	3, 872	287	4, 159
Total	1, 490, 112	5, 868, 178	7, 358, 290
Taxes on vendors	1, 119, 474	922, 439	2, 041, 913
Grand Total	2, 609, 586	6, 790, 617	9, 400, 203

The full amount of the total estimated taxes on motor fuels cannot be taken as the possible cost to the Government, since it is based upon total purchases of motor fuels without allowance for any exemptions of motor fuel not used upon the public highways. The motor fuel tax laws of 39 states contain such exemption and it appears that exemptions might have been claimed as to approximately 80 percent of the purchases in those states.²⁹ We

²⁹ If exempt from motor fuel taxes the sales of the fuel would be subject to general retail sales taxes in states which levy a sales tax. The rates, however, are much lower. The percentage was calculated as follows: The Supervisor in each of the nine construction zones fixed by the Quartermaster General furnished estimates obtained from the contractors in his zone of the percentages of gasoline and the percentages of other motor fuel used on the highways. The averages of the percentages of gasoline and other motor fuel used in all nine zones upon the highways were 23.7% and 12.8%, respectively. Applying these respective percentages to the total value of gasoline and the total value of other motor fuel purchased by all contractors engaged in construction

are without information as to whether, and, if so, to what extent, such exemptions have been claimed by distributors in payment of taxes to the states.³⁰

C. SUPPLY AND EQUIPMENT CONTRACTS

Between June 1, 1940, and September 15, 1941, the War and Navy Departments executed 143 cost-plus-a-fixed-fee contracts for supplies and equipment, including planes, tanks, powder, shells, and other articles of war. An estimate of the possible taxes which might be collected by states from the contractors on these contracts is extremely difficult. The contractors are not required to submit reports of itemized expenditures for materials or labor to

work we obtained the total value of gasoline and the total value of other motor fuels used upon the highways. The sum of these totals divided by the total value of all gasoline and motor fuel purchased gives 19.9% as the average weighted percentage of all such purchases. Taking 19.9% of the total estimated taxes on motor fuels in states having non-highway-use exemptions, \$1,573,238, plus the total of motor fuel taxes in states without such exemptions, \$1,494,484, plus the total of sales taxes collectible on the exempt purchases, \$103,250, we obtain \$3,170,972 as the rough estimate of the possible cost to the Government if exemptions are claimed in all cases where gasoline is not used upon public highways. While this percentage is based solely on War Department contracts, these are sufficiently representative of all the construction work to afford a basis for rough estimate of the value of the exemption.

³⁰ The cost-plus-a-fixed-fee contractors have excluded the amount of taxes from payments to distributors, on the grounds that the purchases were made entirely on behalf of the United States, and hence have had no occasion to request exemptions. Where taxes have been paid by the distributors without claim of such exemption, the right to recovery or refund of the tax paid upon fuel which was not used upon the highways may have been lost by elapse of the period allowed by statute for claim of refund.

any central agency. Operations have not yet begun or are in their primary stages, and many contractors who are engaged in new types of production have no experience bases upon which to project estimates of expenditures for labor and materials. Furthermore, the bulk of materials will not be consumed in manufacture, but will enter into and become a component part of the finished products, and under most sales-tax statutes sales of such materials would not be taxable.¹¹ A number of subcontracts have been let on a lump-sum basis, and the right of the states to collect taxes upon sales of materials to such contractors not being questioned, these must be excluded.

To obtain some basis for estimates a small group of contractors experienced in several types of production were selected. The Government Department with whom their contracts were in force then requested the selected group of contractors for the estimates of the total expenditures to be made for labor, the total expenditures to be made for mate-

¹¹ Sales taxes are generally imposed upon gross receipts from sales of tangible personal property for use or consumption, and "not for resale." Sales of materials or parts intended to be manufactured into or placed in finished products that will then be sold at retail are not taxed. In states which view cost-plus-a-fixed-fee contractors as independent contractors the delivery of finished products under contract constitutes a sale to the United States, and no attempt has yet been made to collect taxes thereon. On the other hand, sales to the contractors of tools, bits, dyes, sandpaper, chemicals, and other materials which are consumed in processing without becoming component parts of finished products are taxable. The problem is to determine what portion of total material purchases will be taxable on this basis, especially in absence of experience records.

rials, and the expenditures to be made for materials which were taxable under the applicable state tax laws.

Upon the basis of such of these estimates as appeared reasonably accurate similar estimates of taxable materials were prepared upon individual contracts for the same type of work, by application of ratios of the value of taxable materials to the total estimated cost of materials. The state tax rates were applied to the figures so obtained.

This procedure was confined largely to contracts for the production of planes, plane parts, and motors. Due to the unsatisfactory nature of reports on other contracts estimates of sales taxes on purchases of materials thereunder were made as follows:

Upon the best estimates obtainable from the Ordnance Departments of the Army and the Navy it was assumed that of the total materials purchased an average of 90 percent would become a component part of the finished product, and in general would not be taxed.³² To the remaining 10 percent of the total value, representing the estimated average value of materials which would be consumed by cost-plus principal contractors and cost-plus subcontractors in manufacture, including tools, the rate of tax in the respective states was applied.³³

³² See footnote 31, above.

³³ Where the state had no complementary use taxes it was assumed that only 10 percent of the material purchases would be intrastate, and, therefore, only 10 percent of the tax as calculated above was included. The 10 percent figure is much below the average of percentages of intrastate purchases actually reported by contractors engaged in construction work in those states: Arkansas, 41%; Illinois, 66%; Missouri, 48%; West Virginia, 70%. However, the types of materials required for supply contracts are less likely to be locally obtainable.

In estimates of gross receipts taxes the applicable state rate was applied to the total of all expenditures for labor.

The result is an estimate of taxes which might be collected through validation of the States claim that cost-plus-a-fixed-fee supply contractors make purchases of materials on their own behalf and sell finished products to the United States.

However, this figure might not accurately reflect the impact of the tax burden upon the United States. If it be held, consistent with the position taken in our brief, that the Government is itself purchasing all the materials necessary for the execution of the contract through the medium of its cost-plus-a-fixed-fee contractors then the United States might be regarded as the ultimate consumer of all materials so acquired and, accordingly, there would be no resale of the finished products to the United States within the meaning of the typical general state sales tax. We, therefore, make an alternative computation of taxes classified on the basis of their legal incidence upon consumable materials and labor and upon the portion of the materials which will constitute a part of the finished product.

The results of these estimates appear below:

Estimated sales and gross-receipts taxes on 143 cost-plus-fixed-fee supply and equipment contracts executed prior to September 15, 1941

Classification of Tax	Tax on consumable materials ²⁴ and labor	Tax on remainder of materials ²⁴	Total
Taxes on Vendees.....	\$4,167,958	\$2,843,654	\$7,011,612
Taxes unclassified.....	1,095,730	9,048,342	10,144,072
Total.....	5,263,688	11,891,996	17,155,684
Taxes on Vendors.....	2,164,541	5,595,386	7,759,927
Grand Total.....	7,428,229	17,487,382	24,915,611

²⁴ Including equipment.

²⁵ These taxes do not appear in Table IV, *Taira*, pp. 42-43, nor in the table of recapitulation, *infra*, p. 19.

Motor fuel and contractors license taxes were not considered in connection with supply contracts; the small amount of motor fuel purchased is not used upon the highways, and the license taxes which we have considered are generally confined to construction contractors.

RECAPITULATION AND PROJECTION

We set forth below by way of recapitulation a tabulation of the total state sales, use, gross receipts and similar taxes involved in the operations of the cost-plus-a-fixed-fee contractors (exclusive of any state taxes upon the contractors' fixed fee) under 548 construction and supply and equipment contracts. With a few exceptions, these embrace all cost-plus-a-fixed-fee construction contracts let by the United States Government prior to June 15, 1941, and all cost-plus-a-fixed-fee supply contracts executed prior to September 15, 1941. The total estimated cost of the 548 contracts is \$6,720,929,777.

Estimated sales, gross receipts and motor-fuel taxes on activities of cost-plus-a-fixed-fee prime contractors and cost-plus-a-fixed-fee subcontractors on 548 construction and supply and equipment contracts

Classification of Tax	Motor Fuel Taxes	All Other Taxes	Total
Taxes on Vendees.....	\$7,354,131	\$14,402,894	\$21,757,025
Taxes Unclassified.....	4,159	6,194,284	6,198,443
Total.....	7,358,290	20,597,178	27,955,468
Taxes on Vendors.....	2,041,913	3,948,796	5,990,709
Grand Total.....	9,400,203	24,545,974	33,946,177

From the above table we may obtain the following estimates of the effect of the possible alternative decisions by this court, in terms of their cost to the United States on these 548 contracts:

(1) Should it be held, in accordance with the argument in our main brief, that with respect to activities of the United States through its cost-plus-a-fixed-fee contractors the states may collect taxes levied upon vendors, but not taxes levied upon vendees, the Government will be relieved of taxes totalling \$21,757,025. Assuming that the "taxes unclassified" will be construed as vendee taxes this saving would be increased to \$27,955,468. At the same time the Government will pay taxes totalling \$5,990,709.

(2) On the other hand, should it be held that the cost-plus-a-fixed-fee contractor is an independent contractor for the purposes of state taxation the cost would be \$33,946,177.

(3) If it should be held that the purchases under cost-plus-a-fixed-fee contracts are in reality the purchases of the United States, but that the United States is subject only to vendors taxes thereon the figure of \$5,990,709 shown in table above must be increased by \$5,595,368, shown in the table of estimated taxes on supply and equipment contracts (*supra*, p. 18) as the estimate of vendors' taxes on materials which United States purchases for inclusion into its manufactured products, giving a total of \$11,586,095.

(4) If it is held that the United States is subject to all taxes upon purchases through its cost-plus-a-fixed-fee contractors, the total cost would be the total shown in the above table plus all taxes on materials purchased under the supply contracts which it would consume by inclusion into its finished products

(*supra*, p. 18) and the final figure would be \$51,433,-559.

There is no entirely satisfactory basis upon which to make estimates of future costs to the United States of taxes upon cost-plus-fixed-fee contracts. It is now estimated, very roughly, that a total of eighteen billion dollars will be expended during the fiscal year 1942 for the types of construction and production which may be accomplished through the medium of cost-plus-a-fixed-fee contracts. Although exact figures are not available the best estimates obtainable indicate that \$7,625,000,000 have already been included in our figures upon a lump-sum basis. The difference or \$15,375,000,000 is the best present estimate of the total value of expenditures now authorized which it seems likely will be made through cost-plus contracts during the fiscal year 1942.

Upon the basis of the relation of our tax figures to the total expenditures under the 548 contracts which we have covered,³⁶ we may estimate additional tax costs, for the year 1942, as follows:

Taxes on Vendees.....	\$42, 000, 000
Taxes Unclassified.....	12, 000, 000
Total.....	54, 000, 000
Taxes on Vendors.....	11, 500, 000
Grand total.....	65, 500, 000

³⁶ Our figures are based upon contracts having a total value of \$6,720,929,777. The ratio of estimated possible taxes of each category, as shown in the tabular recapitulation (*supra*, p. 19), to the total value of the contracts, is .00323, .00092, and .00089, respectively. These ratios are applied to the estimated expenditures of \$13,000,000,000.

II

TAXES ON PURCHASES MADE DIRECTLY BY THE UNITED STATES

The Bureau of Labor Statistics prepared from its files a table of all Government purchase contracts having a value in excess of \$10,000 during the years 1939 and 1940 and the first two quarters of 1941.³⁷ Figures showing the point of sale or delivery, by states, of all such purchases could not be obtained. However, figures tabulated according to the state within which delivery was made were obtained as to the portion of these purchases which were made by the Works Projects Administration during the named periods. Its purchases comprised approximately one-fourth of the total during the years 1939 and 1940, and a lesser percentage during the first two quarters of 1941. From these two tabulations some estimate of sales and use taxes on all Government purchases was possible.

The sales-tax rates were applied to all purchases of materials by the Work Projects Administration, excluding food products,³⁸ in 18 states having complementary use taxes. In the 4 states having no use taxes it was assumed that no more than 10 percent of

³⁷ See the following table:

	1939	1940	1941	Total
Value of motor fuels purchased by government	\$21, 599, 518	\$25, 136, 773	\$27, 646, 321	\$74, 382, 612
Value of all other purchases, less food products, planes, and naval vessels	361, 174, 383	1, 821, 779, 663	1, 588, 047, 034	3, 781, 801, 080
Total	383, 573, 901	1, 856, 916, 436	1, 615, 693, 355	4, 556, 183, 692

³⁸ Sales of food products are generally exempted from retail sales taxes.

the purchases were intrastate, and the sales-tax rate was applied to 10 percent of the total value of its purchases. The taxes so computed, for each of the 22 states having sales taxes, for the years 1939, 1940, and the first half of 1941 were then totalled, and the total tax for each year was divided by the total value of purchases made by the Work Projects Administration during each of the respective periods. Thus, we obtained for each of these periods the ratio which the taxes calculated on its purchases bore to its total purchases.³⁹

Applying these ratios to the total of all Government purchases, excluding purchases of food products, aircraft and naval vessels,⁴⁰ during the same periods, including the purchases of the Work Projects Administration, we obtained figures which approximate to some degree the savings which the United States derived from immunity of its purchases during these periods. On the basis of our previous computations these figures were apportioned as vendee, vendor, or unclassified taxes.⁴¹

To approximate possible taxes on purchases of motor fuels by the United States we divided the total

³⁹ These ratios were 1.036, 1.068, and .982, respectively.

⁴⁰ Some of these were embraced by our figures on construction and supply contracts. The exact proportion was not ascertainable, so all were excluded.

⁴¹ The total of sales taxes shown on Table IV, *infra*, pp. 42-43, \$18,780,459, plus sales tax on materials not consumed in supply contracts, *supra*, p. 18, is \$36,267,841. Of this total 15.64 percent was collected under statutes classified as levying a tax upon the vendee, 42.03 percent under statutes which could not be classified, and 42.33 percent under statutes which imposed the tax upon the vendor. Taking these percentages of the total estimated sales taxes on property purchased directly by the United States we obtain a representative apportionment.

amount of taxes computed as described above upon the motor fuels purchased by cost-plus-a-fixed-fee contractors by the total amount of all purchases of cost-plus-a-fixed-fee contractors in all states, obtaining a ratio of the taxes to the total dollar value of purchases. Applying this ratio to the total dollar value of purchases of motor fuel furnished by the Bureau of Labor Statistics for the years 1939, 1940, and the first two quarters of 1941, we obtained an approximation of the savings to the United States derived from immunity of these purchases. Again the estimates were apportioned as vendee, vendor, or unclassified taxes.⁴²

The results of these estimates appear as follows:

Estimated sales taxes and motor-fuel taxes on direct purchases by the United States during 1939, 1940, and the first two quarters of 1941

MOTOR FUEL

Classification of Tax	1939	1940	1941	Total
Taxes on Vendee.....	\$16,897,203	\$19,064,498	\$21,627,717	\$58,189,518
Taxes Unclassified.....	10,800	12,502	13,523	37,191
Total.....	16,908,103	19,677,006	21,641,540	58,226,709
Taxes on Vendor.....	4,691,415	5,459,707	6,004,781	16,155,903
Grand Total.....	21,599,518	25,136,773	27,646,321	74,382,612

⁴² The total of all taxes upon motor fuels purchased in connection with the construction contracts was \$9,400,203, *supra*, p. 14. Of this sum 78.23 percent was collected under statutes classified as levying a tax upon the vendee, .05 percent under statutes which could not be classified, and 21.72 percent under statutes which imposed the tax upon the vendor. Taking these percentages of the total estimated taxes upon motor fuels purchased directly by the United States we obtain a representative apportionment according to our classification of the various statutes.

SALES TAXES

	1939	1940	1941	Total
Taxes on Vendee.....	\$596,508	\$3,039,717	\$2,438,999	\$5,085,224
Taxes Unclassified.....	1,576,148	8,222,500	6,584,420	16,353,068
Total.....	2,162,656	11,262,217	8,993,419	22,438,292
Taxes on Vendor.....	1,587,398	8,281,190	6,607,203	16,465,791
Grand Total.....	3,750,054	19,563,407	15,591,622	38,908,083
Total All Taxes.....	24,909,572	44,700,180	43,592,543	113,290,695

III

**TOTAL TAX LIABILITY ON GOVERNMENT PURCHASES
MADE DIRECTLY AND THROUGH COST-PLUS-A-FIXED-
FEE CONTRACTORS**

In Point I we have estimated the total tax liability involved, with respect to vendee and unclassified taxes alone, upon cost-plus-a-fixed-fee contractors as about \$27,955,468 upon the contracts now in force (*supra*, p. 19). We have suggested that the total tax liability, including that upon existing and new cost-plus contracts, may reach \$54,000,000 during the fiscal year 1942 (*supra*, p. 21).⁴³ This is the measure of the added tax liability which turns upon Point III of our brief, pp. 81-117.

In Point II of this Appendix, we have estimated that vendee and unclassified sales taxes upon the purchases which the Government makes directly through the regular government departments and agencies, would approximate \$30,634,959 for the first six months of 1941 (*supra*, p. 25). This indicates a potential liability for these taxes of over \$65,000,000 for the fiscal year 1942, since the vol-

⁴³ If the unclassified taxes are excluded, the liability for vendee taxes alone will be about \$21,757,025 for the contracts now in force (*supra*, p. 19), and \$42,000,000 for the fiscal year 1942 (*supra*, p. 21).

ume of purchases is rapidly increasing. Adding the above liability for purchases through the cost-plus-a-fixed-fee contractors, and including an estimate to reflect the added liability under cost-plus-supply contracts (*supra*, p. 18), a total liability of about \$137,000,000 may be supposed to represent the tax liability which would be incurred for the fiscal year 1942 if the court below were to be reversed on Point II of our brief, pp. 36-81.⁴⁴

IV

STATE REVENUE COLLECTIONS

The suggestion that inability of states to tax the activities of cost-plus-a-fixed-fee contractors may result in impairment of state revenues is evidently based upon the premise that defense activities are enveloping an ever-increasing volume of industrial and commercial activity. It ignores the fact that many contracts have been let upon a lump-sum basis, with an aggregate value approximating that of the cost-plus-a-fixed-fee contracts, and that no question has been raised as to the right of states to collect taxes upon the activities under such contracts. It also disregards the increase of consumer spending which flows from increased Government spending, an increase which will be indirectly reflected in many different types of state taxes.

A comparison of state tax collections for the fiscal years 1939, 1940, and 1941 shows clearly that the revenues of nearly all states are steadily increasing.

⁴⁴ If unclassified taxes are excluded, the liability of the Government for vendee taxes would be \$24,066,716 for the first six months of 1941 (*supra*, p. 25), and more than \$50,000,000 for the fiscal year 1942. Adding the cost-plus contract liability for the fiscal year 1942, a total of about \$97,000,000 would be represented for that year by vendee taxes alone.

A comparative statement of collections in all states having a fiscal year ending June 30, 1941, was prepared by the Division of State and Local Government of the Bureau of the Census and is here reprinted.

State tax collections, 1939, 1940, and 1941 (fiscal years ending June 30, in thousands of dollars)

	TOTAL TAXES REPORTED			TOTAL SALES TAXES		
	1939	1940	1941	1939	1940	1941
United States.....	\$3,968,569	\$4,170,813	\$4,460,000	\$1,484,726	\$1,647,377	\$1,805,000
Alabama.....	49,914	55,134	(1)	23,736	26,792	-----
Arizona.....	17,428	20,194	(2)	9,123	10,018	-----
Arkansas.....	31,333	34,111	(2)	18,167	20,563	22,086
California.....	317,566	330,848	368,911	145,732	155,224	175,984
Colorado.....	36,235	39,826	42,192	18,151	20,598	20,088
Connecticut.....	55,928	61,944	64,130	14,973	17,980	19,683
Delaware.....	11,981	13,169	13,069	2,690	2,862	3,185
Florida.....	57,900	60,697	(1)	28,240	29,772	-----
Georgia.....	50,997	52,925	59,973	24,410	27,990	31,859
Idaho.....	12,159	14,053	14,915	4,780	5,570	5,872
Illinois.....	249,156	270,148	280,872	129,267	145,599	156,205
Indiana.....	92,240	100,514	103,577	47,309	53,021	58,118
Iowa.....	70,449	72,906	74,845	35,065	37,063	38,817
Kansas.....	41,847	43,352	45,137	21,478	21,958	24,123
Kentucky.....	51,726	53,404	60,553	20,009	20,976	24,003
Louisiana.....	79,953	81,420	(1)	33,369	35,785	37,450
Maine.....	23,783	24,646	(2)	6,675	7,399	-----
Maryland.....	47,739	56,899	(1)	14,661	16,792	-----
Massachusetts.....	144,629	158,726	(1)	27,153	36,963	-----
Michigan.....	176,173	194,199	229,366	94,660	98,909	112,496
Minnesota.....	83,489	89,470	92,059	24,193	23,631	24,037
Mississippi.....	29,431	35,185	37,685	19,816	22,966	24,692
Missouri.....	88,638	92,825	(1)	38,729	41,724	-----
Montana.....	13,689	14,954	16,304	5,220	5,795	6,170
Nebraska.....	25,460	28,609	(2)	13,065	13,598	13,733
Nevada.....	4,491	4,657	4,840	1,415	1,709	1,876
New Hampshire.....	15,179	15,844	15,957	3,973	5,381	5,549
New Jersey.....	135,708	153,828	163,394	30,867	32,660	34,318
New Mexico.....	15,479	17,578	18,519	8,195	9,892	10,403
New York.....	535,422	587,735	614,837	102,410	126,900	137,736
North Carolina.....	79,860	86,240	90,532	36,607	40,316	46,823
North Dakota.....	12,347	14,062	16,094	6,738	7,067	8,580
Ohio.....	247,230	265,327	(1)	124,443	138,869	-----
Oklahoma.....	61,342	71,879	62,858	28,980	29,618	32,555
Oregon.....	29,031	31,825	35,964	10,706	12,982	12,768
Pennsylvania.....	314,492	337,326	(2)	81,550	83,290	-----
Rhode Island.....	21,756	26,571	(2)	4,439	5,249	-----
South Carolina.....	33,064	34,637	39,196	18,435	20,595	23,605
South Dakota.....	16,023	17,401	(2)	9,889	11,839	12,572
Tennessee.....	49,039	51,826	55,309	22,594	24,697	27,865
Texas.....	126,115	144,696	(1)	56,902	59,306	-----

¹ Fiscal year ending later than June 30, 1941.

² Reports not complete on all taxes; totals not yet available.

³ No reports yet received for 1941.

*State tax collections, 1939, 1940, and 1941 (fiscal years ending June 30,
in thousands of dollars)—Continued*

	TOTAL TAXES REPORTED			TOTAL SALES TAXES		
	1939	1940	1941	1939	1940	1941
Utah.....	\$17,992	\$19,733	\$21,170	\$7,785	\$8,571	\$9,276
Vermont.....	11,359	11,641	12,393	3,791	4,160	4,392
Virginia.....	57,278	56,808	63,911	18,667	19,869	20,312
Washington.....	63,387	60,359	76,112	35,782	42,547	47,327
West Virginia.....	53,069	56,236	(¹)	27,847	30,438	.....
Wisconsin.....	91,064	97,266	106,831	25,377	29,911	31,884
Wyoming.....	8,579	8,160	(¹)	4,764	5,044	.....

¹ Fiscal year ending later than June 30, 1941.

² No reports yet received for 1941.

TABULAR ANNEX

State Taxing Statutes classified as to incidence of the tax and presence or absence of express exemptions of Sales to the United States:

I. TAXES ON VENDEES

(a) *With exemptions.*—*Arizona*, Motor Vehicle Fuel Tax, Revised Code of Arizona, 1928, Sec. 1673, as added by Laws of 1931 (1st Special Session), c. 16, Sec. 1, and amended by Laws of 1933, c. 27, Sec. 2; *California*, Motor Vehicle fuel License Tax Act, California General Laws (Deering, 1937), Act 2964, as amended; *Colorado*, Emergency Retail Sales Tax Act of 1935, Session Laws of Colorado, 1935, c. 189, as extended by Initiated Measure No. 4, Sec. 5; Motor Fuel Sales Tax, Colorado Statutes Annotated (Michie, 1935), c. 16, Secs. 281 et seq., as amended (Michie, 1940) Supp.; *Connecticut*, Motor Vehicle Fuel Tax, General Statutes of Connecticut, Revision of 1930, Sec. 1659 et seq., as amended; *Delaware*, Motor Fuels Tax, Revised Code of Delaware, 1935, Secs. 207 et seq.; *Illinois*, Motor Fuel Tax Laws of 1929, p. 625 (Smith-Hurd Revised Statutes, 1934, c. 120, Sec. 417); *Kansas*, Motor Fuel Tax Law, General Statutes of Kansas, 1935, Sec. 79-3401, as amended; *Kentucky*, Gasoline Tax, Kentucky Acts of 1936 (3rd Special Session), House Bill, 41, effective June 1, 1936; *Minnesota*, Tax and Fee on Motor Vehicle Fuels, Mason's Minnesota Statutes, 1927,

1940 Supp., c. 13, Sec. 2720-70, as amended; *Mississippi*, Emergency Revenue Act of 1934 (Gross Sales), General Laws of Mississippi, c. 119; Gasoline and Oil Tax, General Laws of Mississippi, 1936, c. 162, as amended; *Missouri*, Motor Vehicle Fuel Tax, Revised Statutes of Missouri, 1939, Sec. 8413 et seq., as amended; *Montana*, Gasoline License Tax, Revised Codes of Montana, 1935, Anno., Sec. 2381.12 et seq., as amended; *Nevada*, Motor Vehicle Fuel Tax Statutes of Nevada, 1935, c. 74, Sec. 2 et seq.; *New Jersey*, Motor Fuels Tax, Revised Statutes of New Jersey, 1937, Title 54, c. 39, Sec. 27 et seq.; *New Mexico*, Motor Fuel Tax, Laws of New Mexico, 1937, c. 83, Sec. 2 et seq., as amended; License Tax—Contractors, Laws of 1939, c. 197, effective 6/10/39; Privilege—"Emergency School Tax Act"—Gross Receipts (as applied to contractors), Laws of 1935, c. 73, Art. 2, Sec. 201, as amended; *North Carolina*, Wholesale and Retail Merchants' Sales Tax—"Sales Tax Article of 1939," Revenue Act of 1939, Schedule E, Art. V, effective 7/1/39, as amended; *Ohio*, Gasoline Tax, Page's Ohio General Code, Vol. 4, Sec. 5527 et seq.; *Oklahoma*, Gasoline Tax, Session Laws of 1939, H. B. 415, effective 5/31/39, Sec. 2 et seq., as amended; Sales Tax Act of 1941, Laws of Oklahoma, 1941, H. B. 224, effective 6/1/41, Sec. 5 et seq., as amended; *Oregon*, Gasoline Tax, Oregon Compiled Laws Annotated, Vol. 7, Sec. 110-1702, et seq., as amended; *Pennsylvania*, Liquid Fuel Tax Act, 72 Purdon's Pennsylvania Statutes Annotated, Sec. 2611; *Virginia*, Motor Fuel Tax Acts of Assembly of Virginia, 1932, c. 212, Sec. 5, et seq.; *Washington*, Petroleum Products Tax, Laws of 1933, c. 58, Sec. 5, et

seq., as amended; Occupation and Sales Tax or Excise of 1935, Remington's Revised Statutes of Washington, Annotated, Vol. 9, Sec. 8370-1, et seq. (as applied to contractors); *West Virginia*, General Consumers Sales Tax, Acts of West Virginia, 1937, H. B. 60, c. 108, Art. 15, Sec. 3, et seq.; *Wisconsin*, Motor Fuel Tax Law, Wisconsin Statutes, c. 78, Sec. 78.02, et seq., as amended; *Wyoming*, Selective Sales Tax Act of 1937, Laws of Wyoming, 1937, c. 102, Sec. 4, et seq., as amended; *Hawaii*, Fuel Tax, Revenue Laws of Hawaii, 1935, c. 64, Sec. 2013, et seq., as amended.

(b) *Without exemptions.*—*Alabama*, Consumers' Sales Tax, General Acts of Alabama, 1939, No. 18, effective March 1, 1939; *Arizona*, Gross Income Tax, Laws of Arizona, 1935, c. 77 (H. B. 118) (cited as "The Excise Revenue Act of 1935") (as applied to contractors); *Arkansas*, The Arkansas Retail Sales Tax Law, Pope's Digest of the Statutes of Arkansas, 1937, Art. 154 of 1937, approved and effective July 1, 1941, as amended by Act 369 of 1939; *Delaware*, Business Occupations Tax (as applied to contractors), Revised Code of Delaware, 1935, Secs. 196, et seq.; *Florida*, General License Tax Act of 1937, Laws of Florida, 1937, c. 18011, Sec. 11; Gasoline Tax, General Laws of Florida, 1931, c. 15659; *Idaho*, Motor Fuels Tax, Session Laws of 1933, c. 46 (H. B. 20); *Indiana*, Gross Income Tax Act of 1933, Acts of Indiana, 1933, c. 50, as amended; Gasoline Tax Acts of Indiana, 1923, c. 182; *Iowa*, Motor Vehicle Fuel-Tax, Code of 1939, T. XIII, Sec. 509301, c. 251.3, et seq.; *Kansas*, Kansas Retailers' Sales Tax Act, 1939 Supplement to General Statutes of Kansas, 1935, c. 79, Art. 36; *Ken-*

tucky, Motor Fuels Tax, Kentucky Acts of 1936 (3d Special Sess.), H. B. 63, effective May 19, 1936; *Louisiana*, Public Welfare Revenue Act (Sales Use Tax) Act 2 of Legislature 1938, Repealed by Act 82 of 1940, effective 12/31/40; Contractors License Tax, Act 15 of Third Special Session of 1934, effective January 9, 1935, as amended; *Maine*, Gasoline Tax, Revised Statutes of Maine, 1930, c. 12, Sec. 79, et seq.; *Maryland*, Motor Vehicle Fuel Tax, Annotated Code of Maryland, 1939, Ed., Art. 81, Secs. 240, et seq.; *Massachusetts*, Motor Fuels Tax, General Laws of Massachusetts (Ter. Ed.), c. 64-A, as amended; *Michigan*, Gasoline Tax, Compiled Laws of Michigan, 1929, c. 60, Secs. 3576, et seq.; *Missouri*, Sales Tax, Revised Statutes of Missouri, 1939, Sec. 11408, et seq.; *New Hampshire*, Motor Vehicle Road Tolls, Public Laws of New Hampshire, 1926, c. 104, Sec. 4, et seq.; *New York*, Motor Fuel Tax, Cahill's Consolidated Laws of New York, 1930, c. 61, Art. 12-A, Sec. 284, et seq., as amended; *North Carolina*, License Taxes, Public Laws of North Carolina, c. 158, Art. II, Schedule B, effective May 31, 1939, Sec. 122; *Ohio*, Retail Sales Tax, Page's Ohio General Code, Vol. 4, Sec. 5546-2, et seq. as amended; *South Carolina*, Gasoline Tax, Code of South Carolina, 1932, Vol. II, Sec. 2505; Contractors Tax, Code of South Carolina, 1932, Vol. II, Sec. 2543; *Philadelphia*, Ordinance Imposing a tax on Salaries, Wages, and Commissions, approved December 13, 1939; *South Dakota*, Motor Vehicle Fuel Tax, South Dakota Code of 1939, Sec. 57.3802, et seq.; Retail Occupational Sales Tax, South Dakota Code of 1939, Sec. 57.3201 et seq.; as amended; *Texas*, Motor Fuel Tax,

Laws of 1941, H. B. 8, Art. XVII, effective 5/31/41, Sec. 2, et seq.; *Utah*, "Emergency Revenue Act of 1933"—Sales, Laws of Utah, 1933, c. 63, Sec. 4, et seq.; *Vermont*, Motor Fuel (Gasoline) Tax, Public Laws of Vermont, 1933, c. 52, Sec. 1228, et seq.; *Washington*, Retail Sales Tax, Revenue Act of 1935 (Laws of 1935, c. 180, Title 3, Remington's Revised Statutes, Sec. 8370-16 et seq., as amended; *West Virginia*, Gasoline Tax, Official Code of West Virginia, 1931, c. 11, Art. 14, Sec. 3, et seq., as amended; Gross Sales Tax (as applied to contractors), Code of West Virginia, c. 11, Art. 13, Sec. 2, as amended.

II. TAXES UNCLASSIFIED

(a) *With exemptions*.—*North Dakota*, Gasoline Tax, Initiated Measure adopted June 30, 1926, Sec. 2, as amended; *New Mexico*, Privilege—"Emergency School Tax Act"—Gross Receipts (as applied to retailers), Laws of New Mexico, 1935, c. 73, Art. 2, Sec. 201, as amended.

(b) *Without exemptions*.—*California*, Retail Sales Tax Act of 1933, California Statutes, 1939, c. 679, as amended by Moratorium Sec. enacted 6/11/41; *Iowa*, Income, Corporation and Sales Tax Code of Iowa, T. XVI, Division IV, c. 329.3, Sec. 6943.073; *Wyoming*, Gasoline Tax, Wyoming Revised Statutes, 1931, Sec. 115-1102, et seq., as amended.

III. TAXES ON VENDORS

(a) *With exemptions*.—*Alabama*, Tax on Motor Fuels other than Gasoline, General Acts of Alabama, 1939, Act No. 590, effective August 1, 1940; *Arkansas*, Motor Fuel Tax Law, Act 383 of 1941, effective July 1, 1941.

(A reenactment of a former law. Act of 1934 (Special Session) effective 2/12/1934); *Georgia*, Motor Fuel Tax Law, Georgia Code, 1933, c. 92-14, as reenacted by Laws of 1937, Act. 191, p. 167; *Louisiana*, Motor Fuel Tax, Louisiana General Statutes (Dart), c. 48; *Nebraska*, Gas Tax, Compiled Statutes of Nebraska, 1937, Sec. 66-401 et seq., as amended; *Puerto Rico*, Gasoline Tax, Act No. 170 of May 13, 1941, amending Secs 1 and 2 of Act No. 40 of April 24, 1931, as found in the Laws of Puerto Rico for 1941.

(b) *Without exemptions.*—*Alabama*, Gasoline Tax, General Acts of Alabama, 1932, No. 324, p. 315; *Arizona*, "The Excise Revenue Act of 1935"—(Gross Income) (as applied to retailers), Laws of Arizona, 1935, c. 77 (H. B. 118); *Florida*, Additional Gasoline Tax, Laws of Florida, 1941, c. 20228, effective July 1, 1941; *Illinois*, Retailers' Occupation Tax Act (Sales), Laws of Illinois, 1933, p. 924, S. B. 665, effective July 1, 1933, as amended; *Louisiana*, Gasoline Tax Law, Act No. 15 of the Extra Session of 1934, as amended by Act No. 4 of the Extra Session of 1935; *Michigan*, General Sales Tax Act, Public Acts of Michigan, 1933, No. 167; *North Carolina* Motor Fuel Tax, Public Laws of North Carolina, 1927, c. 93, Sec. 4, et seq., as amended; *Rhode Island*, Gasoline Tax, General Laws of Rhode Island, 1938, c. 45, Sec. 4, et seq., as amended; *South Carolina*, Gasoline Tax, Code of South Carolina, 1932, Vol. II, Sec. 2505, as amended; *Tennessee*, Gasoline Tax, Code of Tennessee, Sec. 1127, et seq., as amended; Contractors Tax, Tennessee Public Acts of 1937, c. 108, Art. II, Sec. 1, Item 27; *Utah*, Motor Fuels Tax, Revised Statutes of

Utah, 1933, Sec. 57-12-5, et seq., as amended; *Washington*, Occupation and Sales Tax or Excise of 1935 (as applied to retailers), Remington's Revised Statutes of Washington, Annotated, Vol. 9, Sec. 8370-1, et seq., as amended; *West Virginia*, Gross Sales Tax, Code of West Virginia, c. 11, Art. 13, Sec. 2, as amended (as applied to retailers); *Hawaii*, General Excise Tax Law, Session Laws of 1935, c. 64 (a), Sec. 2025 (b), as amended.

TABLE I.—Expenditures for labor, material, rental of equipment and insurance, and petroleum products by cost-plus-fixed-fee prime contractors and cost-plus-fixed-fee subcontractors on four hundred and five (405) construction contracts on which construction had begun as of June 15, 1941

[Prepared in the Bureau of Labor Statistics, Division of Construction and Public Employment, U. S. Department of Labor]

State	Num-ber of con-tracts	Total cost including fixed-fee	Expenditures to June 15, 1941, by cost-plus-fixed-fee contractors and cost-plus-fixed-fee subcontractors				Estimated expenditures from June 15, 1941, to completion by cost-plus-fixed-fee contractors and cost-plus-fixed-fee subcontractors			
			Labor	Material	Rental and insurance	Petroleum products	Labor	Material	Rental and insurance	Petroleum products
Grand total.....	405	\$3, 118, 786, 853	\$450, 060, 523	\$697, 238, 978	\$17, 170, 620	\$2, 124, 225	\$602, 359, 550	\$783, 840, 754	\$11, 687, 841	\$13, 370, 283
Total continental U. S.....	390	3, 001, 965, 761	428, 768, 311	661, 874, 268	10, 814, 983	5, 708, 875	586, 020, 431	787, 201, 629	11, 402, 351	12, 998, 738
Alabama.....	10	124, 640, 900	6, 055, 426	19, 678, 354	497, 322	119, 594	33, 098, 080	45, 305, 170	678, 778	1, 088, 546
Arkansas.....	1	10, 776, 113	3, 740, 813	5, 964, 990		164, 811				
Arizona.....	3	5, 475, 469	1, 665, 697	3, 557, 470	20, 000	6, 068				
California.....	48	352, 985, 564	33, 668, 089	52, 670, 461	789, 117	310, 032	92, 849, 785	100, 785, 340	1, 775, 070	1, 632, 779
Colorado.....	3	10, 244, 832	1, 697, 201	4, 623, 398	11, 927	85, 343	2, 112, 491	2, 713, 658	37, 196	40, 706
Connecticut.....	4	8, 182, 215	854, 508	1, 772, 126	15, 830	261	788, 395	1, 417, 587	12, 535	13, 035
Delaware.....	2	1, 024, 690	34, 852	150, 878	3, 119	2, 044	173, 571	458, 317	8, 267	6, 888
District of Columbia.....	3	5, 110, 182	335, 676	923, 907		62	304, 474	762, 842	10, 679	11, 442
Florida.....	18	110, 847, 348	17, 801, 047	39, 158, 020	845, 916	219, 328	17, 941, 486	20, 638, 002	269, 410	308, 347
Georgia.....	11	31, 612, 515	12, 680, 948	9, 637, 002	145, 660	101, 346	2, 553, 015	8, 063, 800	66, 460	76, 178
Idaho.....	1	341, 800	102, 962	130, 810	15, 680	598	5, 497	14, 151	198	213
Illinois.....	13	73, 674, 009	17, 334, 322	34, 291, 330	1, 400, 292	244, 288	5, 951, 213	4, 889, 712	66, 450	764, 619
Indiana.....	11	189, 063, 211	36, 948, 375	52, 634, 267	1, 644, 107	338, 355	12, 109, 596	16, 600, 278	232, 506	398, 803
Iowa.....	1	25, 533, 340	5, 400, 000	108, 000	9, 624	48, 600	4, 920, 000	8, 100, 000	113, 400	121, 500
Kansas.....	3	15, 714, 464	5, 489, 776	6, 124, 380	9, 624	152, 498	323, 653	220, 877	2, 709	3, 264
Kentucky.....	4	32, 726, 001	4, 494, 065	4, 778, 405	45, 708	11, 949	4, 469, 875	7, 991, 308	102, 320	185, 209
Louisiana.....	13	119, 136, 147	30, 149, 751	25, 625, 540	3, 452, 265	175, 471	18, 068, 451	27, 997, 723	477, 406	418, 813
Maine.....	4	32, 359, 590	187, 477	421, 089	15, 701	5, 104	9, 657, 051	14, 307, 573	257, 408	214, 391
Maryland.....	15	180, 201, 929	25, 835, 262	19, 690, 914	163, 540	52, 698	40, 821, 211	62, 117, 013	1, 083, 266	980, 946
Massachusetts.....	17	81, 525, 980	21, 450, 066	21, 408, 014	1, 306, 702	298, 264	8, 764, 640	14, 531, 284	302, 656	307, 941

Michigan	6	12,730,441	706,273	3,834,206	138,422	217	1,372,534	2,022,224	80,241	84,982
Minnesota										
Mississippi	3	22,403,520	7,878,454	11,348,100	194,579	1,544	934,033	824,456	11,543	8,400
Missouri	4	105,507,328	18,719,974	22,117,000	202,592	100,206	12,648,327	17,130,017	220,023	335,572
Montana										
Nebraska	1	7,243,366	422,326	455,580	2,370	152	1,930,302	2,728,276	38,196	40,925
New Hampshire	3	7,522,840	648,440	573,063	80,558	1,879	1,224,081	1,771,438	24,800	20,610
New Jersey	10	71,538,384	8,600,970	18,363,655	66,143	38,300	11,704,860	14,780,025	196,440	215,647
New Mexico	3	10,800,044	1,327,383	1,751,217	10,007	108,027	2,224,730	3,360,022	46,812	50,400
Nevada										
New York	10	66,424,374	5,682,980	8,408,188	217,874	124,303	10,880,219	21,280,756	297,306	317,036
North Carolina	6	124,179,684	23,352,799	22,440,843	35,452	300,082	20,308,551	33,816,126	513,039	506,363
North Dakota										
Ohio	6	70,502,979	9,935,601	15,203,040	354,329	217,899	13,823,563	16,106,239	67,974	349,657
Oklahoma	2	10,764,000	184,000	2,724,617	6,834	2,938	2,781,075	3,017,277	32,889	44,310
Oregon	7	114,441,304	1,003,476	4,268,192	92,066	56,175	38,647,269	44,560,267	756,023	606,550
Pennsylvania	26	201,508,497	13,492,166	39,772,110	14,833	82,442	54,776,848	51,663,074	766,704	717,041
Philadelphia										
Rhode Island	15	164,611,281	3,703,320	33,108,876		7,632	52,432,370	41,187,266	411,874	617,810
South Carolina	10	64,310,122	12,200,497	11,236,134		292,924	12,368,994	19,399,968	271,039	290,369
South Dakota	13	32,521,698	6,244,654	10,213,427		250,369	2,187,267	4,923,458	64,773	73,705
Tennessee	1	128,500	38,944	51,685		85	4,056	8,715	122	131
Texas	3	42,896,449	14,946,425	13,106,583	25,997	799,615	2,652,833	2,146,116	30,045	32,192
Utah	26	278,783,972	39,497,378	80,331,281	1,322,658	503,693	55,226,421	64,925,354	1,033,330	1,093,972
Vermont	1	403,000	3,018	104,159	1,768		152,082	113,441	1,588	1,701
Virginia										
Washington	28	128,235,608	31,538,032	51,977,248	2,451,264	419,545	10,894,285	15,115,023	211,493	302,823
West Virginia	14	200,896,086	6,023,180	23,154,414	583,035	93,098	58,875,486	87,632,132	1,233,079	1,218,129
Wisconsin	2	18,777,525	2,207,965	9,212,463	425,586	17,582	3,167,472	458,852	38,808	228,203
Wyoming	1	30,466,000	305,937	665,012		12,136,063	6,898,288	94,576	103,475	
	1	6,112,331	1,696,540	1,024,495		19,108	39,706	94,335	1,321	1,416
Total outside continental U. S.	15	110,824,092	21,292,212	35,364,698	355,646	415,350	16,339,119	26,549,125	265,490	370,515
Hawaii	7	76,891,176	12,947,746	20,383,080	203,830	267,640	13,372,145	21,215,046	212,150	318,226
Puerto Rico	8	39,932,916	8,444,496	15,181,908	151,816	147,710	2,990,974	5,234,079	53,340	62,200

* Estimated.

* Includes Philadelphia.

TABLE II.—*Expenditures for gasoline and other motor fuels by cost-plus-fixed-fee prime contractors and cost-plus-a-fixed-fee sub-contractors on four hundred and five (405) construction contracts on which construction had begun as of June 15, 1941*
 [Prepared in the Bureau of Labor Statistics, Division of Construction and Public Employment, U. S. Department of Labor]

State	June 1, 1940 to June 15, 1941				June 15, 1941 to completion			
	Gasoline		Other motor fuels		Gasoline		Other motor fuels	
	Value	Units (gallon)	Value	Units (gallon)	Value	Units (gallon)	Value	Units (gallon)
Total continental United States	\$2, 709, 233	37, 907, 874	\$1, 465, 228	21, 556, 326	\$7, 081, 085	97, 996, 007	\$5, 016, 083	76, 206, 068
Alabama	62, 866	722, 191	15, 147	222, 456				
Arizona	4, 470	28, 839			691, 990	8, 104, 673	177, 723	2, 783, 210
Arkansas	130, 621	1, 912, 616	20, 065	295, 900				
California	94, 133	1, 575, 951	145, 940	2, 084, 870				
Colorado	42, 415	597, 394	17, 922	314, 422				
Connecticut	14	197						
Delaware	630	10, 500	1, 410	19, 583	589, 364	9, 661, 704	894, 906	12, 785, 656
District of Columbia	28	311	32	438	20, 231	284, 944	8, 548	140, 965
Florida	116, 244	1, 709, 176	29, 009	580, 570	1, 126	15, 859	16, 650	234, 507
Georgia	41, 653	555, 373	24, 121	287, 156	2, 126	35, 467	4, 700	66, 111
Idaho	76	864			5, 126	56, 956	5, 950	81, 507
Illinois	126, 550	1, 435, 013	97, 468	1, 103, 974	104, 081	2, 412, 956	41, 794	819, 400
Indiana	151, 912	2, 625, 166	52, 044	830, 291	31, 403	415, 707	18, 185	216, 488
Iowa	20, 412	287, 349	12, 296	192, 125	27	307		
Kansas	77, 469	1, 122, 739	26, 382	418, 762	446, 906	5, 729, 563	358, 841	4, 101, 926
Kentucky	6, 919	73, 707	2, 449	36, 015	777, 603	10, 231, 615	167, 164	2, 611, 931
Louisiana	86, 683	1, 238, 329	43, 166	419, 067	51, 030	593, 372	30, 740	480, 313
Maine	5, 131	63, 347			1, 684	22, 957	573	9, 065
Maryland	28, 409	443, 900	17, 769	216, 965	130, 776	1, 720, 740	42, 181	620, 313
Massachusetts	104, 649	1, 472, 521	31, 656	445, 559	263, 813	3, 768, 614	131, 163	1, 273, 427
					214, 618	2, 600, 020	359, 880	4, 144, 922
					643, 135	8, 486, 484	38, 131	466, 634
					109, 430	1, 641, 177		

Michigan.....	146	1,304	19	279	29,572	237,260	3,435	50,516
Mississippi.....	406	5,413	313	4,290	3,253	43,373	2,511	33,922
Missouri.....	42,556	560,681	29,735	461,467	169,255	2,267,232	115,180	1,799,859
Nebraska.....	1,520	20,540			8,360	113,378		
New Hampshire.....	385	5,425			5,447	76,718		
New Jersey.....	10,333	175,580	23,517	326,625	61,012	1,016,867	136,221	1,895,041
New Mexico.....	42,346	960,979	18,041	501,139	19,757	420,392	8,417	233,806
New York.....	53,450	797,761	23,120	321,111	187,132	2,046,746	59,318	832,861
North Carolina.....	257,296	2,957,424	17,199	281,961	456,816	5,260,789	30,637	502,246
Ohio.....	90,378	1,197,136	29,064	507,178	192,547	2,500,616	51,047	911,558
Oklahoma.....	2,938	62,510			11,903	253,255	9,188	255,222
Oregon.....	30,228	431,628	24,336	324,480	328,560	4,694,143	265,537	3,027,160
Pennsylvania.....	26,126	373,257	48,964	715,941	247,691	3,538,443	461,563	6,787,691
Rhode Island.....	47,161	664,239	20,734	2,054,000	46,754	638,507	207,926	2,928,535
South Carolina.....	125,109	1,455,793	36,304	368,945	30,880	438,242	10,709	117,681
South Dakota.....					121	1,590		
Tennessee.....	354,023	4,481,304	100,964	2,688,225	14,809	187,456	7,983	112,436
Texas.....	282,189	5,356,232	99,436	1,775,479	694,502	12,398,975	238,566	4,260,112
Utah.....					1,701	13,900		
Virginia.....	191,595	2,100,762	102,513	1,389,785	213,925	2,376,951	177,046	1,748,571
Washington.....	10,615	87,095	69,345	1,326,900	147,906	1,213,062	924,961	18,499,220
West Virginia.....	10,212	130,336	4,010	54,195	160,734	1,064,367	62,545	845,200
Wisconsin.....					47,184	636,182	21,100	213,222
Wyoming.....	8,713	96,811	3,898	50,623	640	7,178	289	3,753
Total Outside Continental U. S.....	98,279	892,790	143,305	1,805,800	57,857	407,142	28,700	550,000
Hawaii.....								
Puerto Rico.....	40,500	225,000	54,000	150,000	38,571	214,285		
	57,779	577,790	89,805	1,653,800	19,286	192,857	29,700	580,000
Grand total.....	2,807,512	38,710,664	1,608,833	23,390,126	7,138,942	98,403,749	5,045,785	76,846,086

TABLE III.—*Estimated cost of operation, labor, material, and equipment on one hundred and forty-three (143) cost-plus-a-fixed-fee supply and equipment contracts*

[Prepared in the Bureau of Labor Statistics, Division of Construction and Public Employment, U. S. Department of Labor]

State	Number of contracts	Estimated cost of operation less fee	Cost of labor	Cost of material	Cost of equipment
Total.....	143	\$3,602,136,924	\$1,955,263,675	\$1,347,763,190	\$395,068,797
Alabama.....	6	83,017,500	55,913,500	26,929,000	29,061,000
Arkansas.....	2	38,775,000	31,443,000	7,332,000	9,548,420
California.....	21	837,980,566	396,662,622	306,373,674	500,000
Colorado.....	2	83,005,963	82,006,963	131,067,050	13,000,000
Connecticut.....	4	46,391,184	24,945,151	20,426,023	7,602,625
Illinois.....	7	97,427,014	71,553,770	25,907,244	22,555,111
Indiana.....	5	182,743,407	128,152,763	54,320,614	43,089,140
Iowa.....	3	95,499,304	64,644,054	30,815,200	16,078,000
Kansas.....	4	33,480,915	22,027,305	8,698,653	4,030,000
Kentucky.....	2	7,454,130	4,918,417	2,535,713	9,446,000
Louisiana.....	3	26,772,000	14,063,360	11,678,640	8,903,700
Maryland.....	3	179,869,203	82,740,016	52,943,000	0
Massachusetts.....	3	6,977,280	4,837,875	2,073,375	0
Michigan.....	13	604,541,476	314,013,360	266,656,166	23,539,470
Minnesota.....	2	63,366,350	39,480,673	23,905,677	11,085,000
Mississippi.....	1	12,875,000	10,555,480	2,319,520	1,091,000
Missouri.....	11	477,300,744	297,384,243	179,117,692	56,465,966
New Jersey.....	4	2,765,375	1,201,040	514,730	52,825
New York.....	20	275,084,937	148,906,266	86,827,563	18,403,149
Ohio.....	9	78,117,579	42,999,770	34,760,989	14,753,470
Oklahoma.....	1	22,612,500	7,667,354	14,925,146	13,952,200
Pennsylvania.....	7	52,587,508	30,700,368	21,535,696	4,100,100

Tennessee.....	2	43,700,000	5,612,604	37,087,396	12,994,800
Texas.....	2	52,190,000	40,962,170	11,227,830	15,587,600
Utah.....	1	54,486,350	34,053,970	20,432,380	11,985,000
Virginia.....	3	36,000,000	12,808,031	22,122,348	35,352,201
Washington.....	2	108,390,118	42,990,863	24,613,253	0
West Virginia.....	1	1,604,000	907,025	696,375	10,300,070
Wisconsin.....	1	135,000	0	0	0

* Includes \$12,316,470 purchased by Government.

* Includes \$8,172,962 purchased by Government.

Mississippi	4	585	6,550	325,260	4,645	495	26,005	26,459	105,554	495,648
Minnesota	15	20,247	265,888		81,741	207,203		214,478		780,747
Nebraska	1	103			5,669					5,772
New Hampshire	3	217			3,009					3,266
New Jersey	23	15,065			86,487					131,552
New Mexico	3	70,106			32,708					294,391
New York	39	44,755			65,256					159,579
North Carolina	6	194,302			114,524					1,712,133
Ohio	15	68,172			345,180					1,598,044
Oklahoma	3	2,750			102,365					398,412
Oregon	7	37,815			440,748					448,881
Pennsylvania	33	32,676			27,968					317,709
Philadelphia	(*)				411,066					1,174,287
Rhode Island	10	108,547			285,033					216,158
South Carolina	13	113,079			107,611					187,235
South Dakota	1				33,355					1,178
Tennessee	5	268,878			62					280,125
Texas	28	285,287			11,247					960,031
Utah	2				664,764					269,226
Virginia	31	104,278			756					250,193
Washington	16	70,666			145,915					5,567,898
West Virginia	3	9,227			946,004					440,003
Wisconsin	2				2,552,455					29,976
Wyoming	1	3,872			141,478					30,000
					29,976					
					287					
Total Continental United States	533	2,486,675	5,099,311	23,223	6,740,117	8,526,806	1,537,396	5,174,542	2,253,987	33,007,438
Hawaii	7	16,278			15,000					765,606
Puerto Rico	8	105,433			35,500					142,133
Total outside United States	15	122,911			50,500					938,739

* Includes tax on overhead cost.

† Included in Pennsylvania.

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Office - Supreme Court, U. S.

FILED

OCT 17 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner,

versus

KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and
UNITED STATES OF AMERICA.

In re: State of Alabama Applying for Writ of Certiorari
to the Supreme Court of the State of Alabama.

**BRIEF OF AMICI CURIAE
FOR THE STATE OF LOUISIANA.**

EUGENE STANLEY,
Attorney General of the State
of Louisiana;

CICERO C. SESSIONS,
Special Assistant Attorney
General of the State of Louisiana;

AMICI CURIAE.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner,

versus

KING AND BOOZER, a partnership composed of Tom
Cobb King and Simon Elbert Boozer, and
UNITED STATES OF AMERICA.

In re: State of Alabama Applying for Writ of Certiorari
to the Supreme Court of the State of Alabama.

**BRIEF OF AMICI CURIAE
FOR THE STATE OF LOUISIANA.**

May It Please the Court:

STATEMENT.

The State of Louisiana has an interest herein due to the pendency in the Supreme Court of Louisiana of "Standard Oil Company of Louisiana v. Rufus W. Fontenot, Director of Revenue, State of Louisiana, United States of America, Intervener," wherein contracts similar to those

in the case of bar are involved with reference to sales of refined petroleum products including gasoline to "cost-plus-a-fixed-fee" contractors.

The only distinction in the issues involved is that the Louisiana taxes are excise taxes laid on the dealers for their privilege in engaging in the business, (*Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466), whereas, in the case at bar the gasoline taxes are in the nature of sales or use taxes, the incidence of which is upon the purchaser or consumer.

SUMMARY OF ARGUMENT.

I.

Entire contract must be construed to determine status of "cost-plus-a-fixed-fee" contract as agent of the United States or as independent contractor. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895; *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673; *United States v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. United States*, 197 Fed. 327; *Lynch v. United States*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393.

II.

"Cost-plus-a-fixed-fee" contractor is not an agent or instrumentality of the United States. *Morgan v. Smith*, 159 Mass. 570; 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill 177; 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148; 165 N. W. 816;

Baumann v. West Allis, 187 Wis. 506; 204 N. W. 907; *J. W. McCrary Engineering Company v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Company*, 84 S. W. 2nd. 506 (Texas Civil Appeals); *Standard Oil Company v. Lee*, 199 So. 325 (Supreme Court of Florida); *Six Cos. Inc. v. DeVinney*, 2nd. Fed. Sup. 693; *Boeing Airplane Co., et al., v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas); *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358; cf. *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17; *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason & Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pa.*, 240 U. S. 319; *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466.

III.

Assessment of taxes on sales of gasoline to "cost-plus-a-fixed-fee" contractors is not an unconstitutional burden on the United States. *Educational Films Corporation of America v. Ward*, 282 U. S. 379; *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18; *Graves v. Texas Company*, 298 U. S. 393; *Graves v. People of the State of New York, ex rel O'Keefe, supra*; *Trinityfarm Construction Company v. Grosjean, supra*; *James v. Dravo Contracting Company, supra*; *Silas Mason Company, Inc. v. Tax Commission of Washington, supra*.

IV.

Attempt to extend the benefits of the doctrine of inter-governmental immunity from taxation to profit contractors is in violation of the reserved constitutional rights of the States to lay non-discriminatory taxes. *Railroad Company v. Peniston*, 18 Wall. 5; *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 945.

ARGUMENT.

I.

**ENTIRE CONTRACT MUST BE CONSTRUED
TO DETERMINE STATUS OF "COST-PLUS-A-
FIXED-FEE" CONTRACTOR AS AGENT OF
THE UNITED STATES OR AS INDEPENDENT
CONTRACTOR.**

The contract in the case at bar is a government form prepared by the Government and embracing the terms, clauses, and provisions that the Government wanted. The contract should be taken and construed as a whole to determine the status of the contractor thereunder as an independent contractor or as an agent or instrumentality of the United States. If there is any ambiguity in the contract it is a fundamental rule that the contracts of the Government itself are to be more strongly construed against the Government. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895.

Insofar as the Government may have contractually obligated itself to assume the payment of the taxes in question, sound public policy requires that the Government keep

its contracts the same as an individual must. *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673.

It is, indeed, a strange interpretation of the law of principal and agent which would permit the United States, purely as a matter of its own convenience, to assert that for some purposes under the "cost-plus-a-fixed-fee" contract, the contractor is an agent of the Government and, yet, for other purposes under the contract, the contractor is an independent contractor. We suggest that the proper view to take is that the contract as a whole must determine the status of the parties and that if a strict construction is applied thereto against the Government (*U. S. v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. U. S.*, 197 Fed. 327; *Lynch v. U. S.*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393), it will be clearly seen that the intention of the Government was to have work done and services furnished by independent contractors. This will be clearly demonstrated by the specific provisions of the contract itself, particularly with respect to the restrictions on the power of the contractor to bind the United States in the acquisition and purchase of supplies, etc.

II.

"COST-PLUS-A-FIXED-FEE" CONTRACTOR IS NOT AN AGENT OR INSTRUMENTALITY OF THE UNITED STATES.

There is nothing new in the use of "cost-plus-a-fixed-fee" contracts in the accomplishment of public works by the Government. It was clearly not intended in the enact-

ment of the Military Appropriations Act, 1941, Public, No. 611, 76th Congress, Third Session, c. 343, and the Act of July 2, 1940, No. 703, 76th Congress, Third Session, c. 508, that there be anything done or authorized to be done by a change in the method of compensation of the contractor under "cost-plus-a-fixed-fee" contracts, the nature of the duties to be performed by him is not changed, nor does it appear to be intended to make him an employee or agent where under a "cost-plus-a-fixed-percentage-of-cost" contract he was an independent contractor. In truth, all that was really accomplished by the legislation was a revision of the method of computation of the compensation of the contractors to avoid repetition of the exorbitant costs and expenses experienced by the Government under other types of contracts.

Under similar contracts, not necessarily, however, involving the United States as a party thereto, the weight of authority appears to be that the contractor is independent. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Baumann v. West Allis*, 187 Wis. 506, 204 N. W. 907; *J. D. McCrary Engineering Co. v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Co.*, 84 S. W. 2nd. 506 (Texas Civil Appeals).

Under an almost identical contract involving similar sales of gasoline under a similar statute, it has been held that the contractor is independent and is not an agent of

the United States. *Standard Oil Company v. Lee*, 199 So. 325 (Supreme Court of Florida). We suggest that there is no substantial difference either in the general nature of the contract entered into or in the general nature and the work to be performed as involved in the case at bar and other cases involving similar contracts. In truth, all that can be said of the contractor is that its relation to the Government is exclusively and purely contractual and that it performs no governmental function as such. It undertakes to construct according to plans and specifications adopted by officials of the Government and its primary object is to comply with the conditions of the contract for the profit to be made thereby. The relationship of the contractor to the Federal Government, then, cannot conceivably be considered as anything other than that of an independent contractor. *Six Cos., Inc., v. DeVinney*, 2 Fed. Sup. 693.

Even where the contractor may have made purchases of materials and equipment for the Federal Government and title may have ultimately vested in the United States, such are not made by the contractor in any capacity of agent. *Boeing Airplane Company, et al. v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas).

The degree of supervision and control exercised by the United States under the "cost-plus-a-fixed-fee" contractor was not essentially different in principle from that exercised by the Department of Interior over Buckstaff

Bathhouse Company as determined in *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, and thereunder, even if the Government does exercise extensive control, it is inconceivable that the type of control which the United States may reserve over any independent contractor and which it actually does reserve over practically all parties with whom it contracts can be the basis for transformation of the contractor into an instrumentality of the Government. Cf. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17.

The line of authorities that we believe to be determinative of the issue of agency here involved, however, is that embracing *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319 and *Trinty-farm Construction Company v. Grosjean*, 291 U. S. 466. Under the doctrines enunciated in those cases, it does not appear that the contractor under a "cost-plus-a-fixed fee" construction contract is himself performing such governmental functions as to be considered an instrumentality of the Government for tax exemption purposes. We submit that it was not the intention of the Government in the execution of the contracts that the contractor become an agent of the United States for any purpose, much less the limited purpose of agency for the acquisition of materials and supplies.

III.

**ASSESSMENT OF TAXES ON SALES OF
GASOLINE TO "COST-PLUS-A-FIXED-FEE"
CONTRACTORS IS NOT AN UNCONSTITU-
TIONAL BURDEN ON THE UNITED STATES.**

In order for the implied doctrine of inter-governmental immunity from taxation to be given effect in the case at bar, it must first of all be determined that the contractors are agents of the Government and that in such capacity the incidence of the tax is upon them as a direct and immediate burden upon the performance of a governmental function.

Even if the contractors in the case at bar are instrumentalities of the Government, we believe that the burden, if any, is consequential and remote and is not direct and immediate.

Since *Educational Films Corporation of America v. Ward*, 282 U. S. 379, the trend has been to restrict the application of the doctrine of inter-governmental immunity from taxation rather than to extend the application of the doctrine. The decisions relied upon by the defendants below in *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18, and *Graves v. Texas Company*, 298 U. S. 393, have in recent years been so distinguished and so limited in their effect by subsequent opinions as to furnish, in our opinion, no authority for the issues here presented. The sales made in those cases were unquestionably directly to the Federal Government itself for direct use of the products sold in acknowledged governmental functions. We believe that the dissenting opinion of Mr. Justice

Holmes in the *Panhandle Oil Company case*, *supra*, clearly expresses what is conceded to be the law today.

We suggest that the more recent decisions in *Graves v. People of the State of New York, ex rel O'Keefe, supra*; *Trinityfarm Construction Company v. Grosjean, supra*; *James v. Dravo Contracting Company, supra*, and *Silas Mason Company, Inc. v. Tax Commission of Washington, supra*, are finally determinative of the doctrine of immunity in the case at bar and that thereunder, there does not appear to be doubt that the burden, if any, is consequential and remote and, therefore, is valid.

IV.

ATTEMPT TO EXTEND THE BENEFITS OF THE DOCTRINE OF GOVERNMENTAL IMMUNITY FROM TAXATION TO PROFIT CONTRACTORS IS IN VIOLATION OF THE RESERVED CONSTITUTIONAL RIGHTS OF THE STATES TO LAY NON-DISCRIMINATORY TAXES.

The powers of the states to lay non-discriminatory taxes are reserved by them under the Tenth Amendment to the Constitution of the United States. It has been many times said and has been well recognized in our jurisprudence, both Federal and state, that in the encroachment of one government upon the other each must of necessity bear a part of the tax burden the other lays. This is because of the overlapping of jurisdiction, territorially and otherwise, which forms an integral and inherent part of our governmental system. Government cannot exist with-

out taxation and the safety of our nation does not require the destruction of the states and their taxing systems.

It is often difficult to determine whether a tax imposed by a state does in effect invade the domain of the Federal Government or interfere with the latter's operations to such an extent as to render it unwarranted. A tax which only remotely affects the efficient exercise of a federal power cannot for that reason alone be inhibited by the Constitution because it must be recognized that states must each be coexistent with the Federal Government and that neither may destroy the other. Hence, a practical construction must be placed upon the Constitution and its limitations and implied prohibitions should not be extended so far as to destroy the necessary powers of the state. *Railroad Company v. Peniston*, 18 Wall. 5. What is being sought here is an obvious and deliberate extension of the doctrine of immunity to private industry in the very teeth of the refusal of Congress to sanction such a program. This attempted expansion of the benefits of the doctrine is no less than an attempt to transcend the imposed constitutional limits on the power of the Federal Government in violation of the reserved sovereign rights of the states within the views expressed in *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 945.

The Constitution of the United States and the laws of the State of Alabama do not require the construction sought to be placed thereupon by the defendants below and if such construction does prevail it may very well be that many if not all of the privilege taxes now constitutionally imposed by the states will become taxes unlawfully

imposed upon an agent or instrumentality of the Federal Government because the taxpayer might at some moment have transacted some business with the Federal Government.

We submit that the taxing system of the states cannot and should not be allowed to crumble and disintegrate by an extension of the implied doctrine of immunity.

CONCLUSION.

We respectfully submit that the "cost-plus-a-fixed-fee" contractors are neither agents nor instrumentalities of the Federal Government, that the assessment of taxes in the case at bar is not a direct and immediate or unconstitutional burden on the United States and that the attempt to extend the doctrine of inter-governmental immunity from taxation to private business is in violation of the rights reserved by the states in the Tenth Amendment to the Constitution of the United States.

Respectfully submitted,

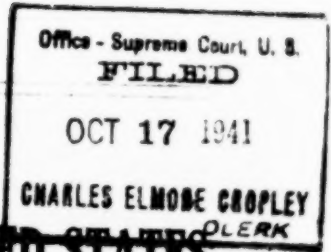
EUGENE STANLEY,
Attorney General of the State
of Louisiana;

CICERO C. SESSIONS,
Special Assistant Attorney
General of the State of Louisiana;

AMICI CURIAE.



FILE COPY



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, individually and as Commissioner of
Revenue of the State of Alabama, Petitioner,

versus

UNITED STATES OF AMERICA and DUNN CON-
STRUCTION COMPANY, INC. and JOHN H. HODG-
SON & COMPANY, partners, doing business as
DUNN CONSTRUCTION COMPANY, INC.
AND JOHN H. HODGSON & COMPANY.

In re: John C. Curry, Individually and As Commissioner
of Revenue of the State of Alabama, Applying
for Writ of Certiorari to the Supreme Court of
Alabama.

**BRIEF OF AMICI CURIAE
FOR THE STATE OF LOUISIANA.**

✓ EUGENE STANLEY,
Attorney General of the State
of Louisiana;

CICERO C. SESSIONS,
Special Assistant Attorney
General of the State of Louisiana;

AMICI CURIAE.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, individually and as Commissioner of
Revenue of the State of Alabama, Petitioner,

versus

UNITED STATES OF AMERICA and DUNN CON-
STRUCTION COMPANY, INC. and JOHN H. HODG-
SON & COMPANY, partners, doing business as
DUNN CONSTRUCTION COMPANY, INC.
AND JOHN H. HODGSON & COMPANY.

In re: John C. Curry, Individually and As Commissioner
of Revenue of the State of Alabama, Applying
for Writ of Certiorari to the Supreme Court of
Alabama.

**BRIEF OF AMICI CURIAE
FOR THE STATE OF LOUISIANA.**

May It Please the Court:

STATEMENT.

The State of Louisiana has an interest herein due
to the pendency in the Supreme Court of Louisiana of
"Standard Oil Company of Louisiana v. Rufus W. Fonte-
not, Director of Revenue, State of Louisiana, United States
of America, Intervener," wherein contracts similar to those

in the case of bar are involved with reference to sales of refined petroleum products including gasoline to "cost-plus-a-fixed-fee" contractors.

The only distinction in the issues involved is that the Louisiana taxes are excise taxes laid on the dealers for their privilege in engaging in the business, (*Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466), whereas, in the case at bar the gasoline taxes are in the nature of sales or use taxes, the incidence of which is upon the purchaser or consumer.

SUMMARY OF ARGUMENT.

I.

Entire contract must be construed to determine status of "cost-plus-a-fixed-fee" contract as agent of the United States or as independent contractor. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895; *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673; *United States v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. United States*, 197 Fed. 327; *Lynch v. United States*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393.

II.

"Cost-plus-a-fixed-fee" contractor is not an agent or instrumentality of the United States. *Morgan v. Smith*, 159 Mass. 570; 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177; 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148; 165 N. W. 816;

Baumann v. West Allis, 187 Wis. 506; 204 N. W. 907; *J. W. McCrary Engineering Company v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Company*, 84 S. W. 2nd. 506 (Texas Civil Appeals); *Standard Oil Company v. Lee*, 199 So. 325 (Supreme Court of Florida); *Six Cos. Inc. v. DeVinney*, 2nd. Fed. Sup. 693; *Boeing Airplane Co., et al., v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas); *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358; cf. *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17; *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason & Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pa.*, 240 U. S. 319; *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466.

III.

Assessment of taxes on sales of gasoline to "cost-plus-a-fixed-fee" contractors is not an unconstitutional burden on the United States. *Educational Films Corporation of America v. Ward*, 282 U. S. 379; *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18; *Graves v. Texas Company*, 298 U. S. 393; *Graves v. People of the State of New York, ex rel O'Keefe, supra*; *Trinityfarm Construction Company v. Grosjean, supra*; *James v. Dravo Contracting Company, supra*; *Silas Mason Company, Inc. v. Tax Commission of Washington, supra*.

IV.

Attempt to extend the benefits of the doctrine of inter-governmental immunity from taxation to profit contractors is in violation of the reserved constitutional rights of the States to lay non-discriminatory taxes. *Railroad Company v. Peniston*, 18 Wall. 5; *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 945.

ARGUMENT.

I.

**ENTIRE CONTRACT MUST BE CONSTRUED
TO DETERMINE STATUS OF "COST-PLUS-A-
FIXED-FEE" CONTRACTOR AS AGENT OF
THE UNITED STATES OR AS INDEPENDENT
CONTRACTOR.**

The contract in the case at bar is a government form prepared by the Government and embracing the terms, clauses, and provisions that the Government wanted. The contract should be taken and construed as a whole to determine the status of the contractor thereunder as an independent contractor or as an agent or instrumentality of the United States. If there is any ambiguity in the contract it is a fundamental rule that the contracts of the Government itself are to be more strongly construed against the Government. *United States v. A. Bentley & Sons Company*, 293 Fed. 229, affirmed 16th Fed. 2nd. 895.

Insofar as the Government may have contractually obligated itself to assume the payment of the taxes in question, sound public policy requires that the Government keep

its contracts the same as an individual must. *Dayton Airplane Company v. United States*, 21 Fed. 2nd. 673.

It is, indeed, a strange interpretation of the law of principal and agent which would permit the United States, purely as a matter of its own convenience, to assert that for some purposes under the "cost-plus-a-fixed-fee" contract, the contractor is an agent of the Government and, yet, for other purposes under the contract, the contractor is an independent contractor. We suggest that the proper view to take is that the contract as a whole must determine the status of the parties and that if a strict construction is applied thereto against the Government (*U. S. v. Newport News Shipbuilding & Dry Dock Company*, 178 Fed. 194; *Scully v. U. S.*, 197 Fed. 327; *Lynch v. U. S.*, 292 U. S. 571; *Insurance Company v. Wright*, 68 U. S. 456; *Noonan v. Bradley*, 76 U. S. 393), it will be clearly seen that the intention of the Government was to have work done and services furnished by independent contractors. This will be clearly demonstrated by the specific provisions of the contract itself, particularly with respect to the restrictions on the power of the contractor to bind the United States in the acquisition and purchase of supplies, etc.

II.

"COST-PLUS-A-FIXED-FEE" CONTRACTOR IS NOT AN AGENT OR INSTRUMENTALITY OF THE UNITED STATES.

There is nothing new in the use of "cost-plus-a-fixed-fee" contracts in the accomplishment of public works by the Government. It was clearly not intended in the enact-

ment of the Military Appropriations Act, 1941, Public, No. 611, 76th Congress, Third Session, c. 343, and the Act of July 2, 1940, No. 703, 76th Congress, Third Session, c. 508, that there be anything done or authorized to be done by a change in the method of compensation of the contractor under "cost-plus-a-fixed-fee" contracts, the nature of the duties to be performed by him is not changed, nor does it appear to be intended to make him an employee or agent where under a "cost-plus-a-fixed-percentage-of-cost" contract he was an independent contractor. In truth, all that was really accomplished by the legislation was a revision of the method of computation of the compensation of the contractors to avoid repetition of the exorbitant costs and expenses experienced by the Government under other types of contracts.

Under similar contracts, not necessarily, however, involving the United States as a party thereto, the weight of authority appears to be that the contractor is independent. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Carieton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Baumann v. West Allis*, 187 Wis. 506, 204 N. W. 907; *J. D. McCrary Engineering Co. v. White Coal Power Company*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. 2nd. 143 (Cal. Appeals); *Allen v. Republic Building Co.*, 84 S. W. 2nd. 506 (Texas Civil Appeals).

Under an almost identical contract involving similar sales of gasoline under a similar statute, it has been held that the contractor is independent and is not an agent of

the United States. *Standard Oil Company v. Lee*, 199 So. 325 (Supreme Court of Florida). We suggest that there is no substantial difference either in the general nature of the contract entered into or in the general nature and the work to be performed as involved in the case at bar and other cases involving similar contracts. In truth, all that can be said of the contractor is that its relation to the Government is exclusively and purely contractual and that it performs no governmental function as such. It undertakes to construct according to plans and specifications adopted by officials of the Government and its primary object is to comply with the conditions of the contract for the profit to be made thereby. The relationship of the contractor to the Federal Government, then, cannot conceivably be considered as anything other than that of an independent contractor. *Six Cos., Inc., v. DeVinney*, 2 Fed. Sup. 693.

Even where the contractor may have made purchases of materials and equipment for the Federal Government and title may have ultimately vested in the United States, such are not made by the contractor in any capacity of agent. *Boeing Airplane Company, et al. v. State Commissioner of Review and Taxation, et al.*, 113 Pac. 2nd. 110 (Supreme Court of Kansas).

The degree of supervision and control exercised by the United States under the "cost-plus-a-fixed-fee" contractor was not essentially different in principle from that exercised by the Department of Interior over Buckstaff

Bathhouse Company as determined in *Buckstaff Bathhouse Company v. McKinley*, 308 U. S. 358, and thereunder, even if the Government does exercise extensive control, it is inconceivable that the type of control which the United States may reserve over any independent contractor and which it actually does reserve over practically all parties with whom it contracts can be the basis for transformation of the contractor into an instrumentality of the Government. Cf. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17.

The line of authorities that we believe to be determinative of the issue of agency here involved, however, is that embracing *Graves v. People of New York, ex rel O'Keefe*, 306 U. S. 466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Company, Inc. v. Tax Commission of Washington*, 302 U. S. 186; *Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319 and *Trinty-farm Construction Company v. Grosjean*, 291 U. S. 466. Under the doctrines enunciated in those cases, it does not appear that the contractor under a "cost-plus-a-fixed fee" construction contract is himself performing such governmental functions as to be considered an instrumentality of the Government for tax exemption purposes. We submit that it was not the intention of the Government in the execution of the contracts that the contractor become an agent of the United States for any purpose, much less the limited purpose of agency for the acquisition of materials and supplies.

III.

**ASSESSMENT OF TAXES ON SALES OF
GASOLINE TO "COST-PLUS-A-FIXED-FEE"
CONTRACTORS IS NOT AN UNCONSTITU-
TIONAL BURDEN ON THE UNITED STATES.**

In order for the implied doctrine of inter-governmental immunity from taxation to be given effect in the case at bar, it must first of all be determined that the contractors are agents of the Government and that in such capacity the incidence of the tax is upon them as a direct and immediate burden upon the performance of a governmental function.

Even if the contractors in the case at bar are instrumentalities of the Government, we believe that the burden, if any, is consequential and remote and is not direct and immediate.

Since *Educational Films Corporation of America v. Ward*, 282 U. S. 379, the trend has been to restrict the application of the doctrine of inter-governmental immunity from taxation rather than to extend the application of the doctrine. The decisions relied upon by the defendants below in *Panhandle Oil Company v. State of Mississippi, ex rel Knox*, 277 U. S. 18, and *Graves v. Texas Company*, 298 U. S. 393, have in recent years been so distinguished and so limited in their effect by subsequent opinions as to furnish, in our opinion, no authority for the issues here presented. The sales made in those cases were unquestionably directly to the Federal Government itself for direct use of the products sold in acknowledged governmental functions. We believe that the dissenting opinion of Mr. Justice

Holmes in the *Panhandle Oil Company case*, *supra*, clearly expresses what is conceded to be the law today.

We suggest that the more recent decisions in *Graves v. People of the State of New York, ex rel O'Keefe*, *supra*; *Trinityfarm Construction Company v. Grosjean*, *supra*; *James v. Dravo Contracting Company*, *supra*, and *Silas Mason Company, Inc. v. Tax Commission of Washington*, *supra*, are finally determinative of the doctrine of immunity in the case at bar and that thereunder, there does not appear to be doubt that the burden, if any, is consequential and remote and, therefore, is valid.

IV.

ATTEMPT TO EXTEND THE BENEFITS OF THE DOCTRINE OF GOVERNMENTAL IM- MUNITY FROM TAXATION TO PROFIT CON- TRACTORS IS IN VIOLATION OF THE RE- SERVED CONSTITUTIONAL RIGHTS OF THE STATES TO LAY NON-DISCRIMINATORY TAXES.

The powers of the states to lay non-discriminatory taxes are reserved by them under the Tenth Amendment to the Constitution of the United States. It has been many times said and has been well recognized in our jurisprudence, both Federal and state, that in the encroachment of one government upon the other each must of necessity bear a part of the tax burden the other lays. This is because of the overlapping of jurisdiction, territorially and otherwise, which forms an integral and inherent part of our governmental system. Government cannot exist with-

out taxation and the safety of our nation does not require the destruction of the states and their taxing systems.

It is often difficult to determine whether a tax imposed by a state does in effect invade the domain of the Federal Government or interfere with the latter's operations to such an extent as to render it unwarranted. A tax which only remotely affects the efficient exercise of a federal power cannot for that reason alone be inhibited by the Constitution because it must be recognized that states must each be coexistent with the Federal Government and that neither may destroy the other. Hence, a practical construction must be placed upon the Constitution and its limitations and implied prohibitions should not be extended so far as to destroy the necessary powers of the state. *Railroad Company v. Peniston*, 18 Wall. 5. What is being sought here is an obvious and deliberate extension of the doctrine of immunity to private industry in the very teeth of the refusal of Congress to sanction such a program. This attempted expansion of the benefits of the doctrine is no less than an attempt to transcend the imposed constitutional limits on the power of the Federal Government in violation of the reserved sovereign rights of the states within the views expressed in *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 945.

The Constitution of the United States and the laws of the State of Alabama do not require the construction sought to be placed thereupon by the defendants below and if such construction does prevail it may very well be that many if not all of the privilege taxes now constitutionally imposed by the states will become taxes unlawfully

imposed upon an agent or instrumentality of the Federal Government because the taxpayer might at some moment have transacted some business with the Federal Government.

We submit that the taxing system of the states cannot and should not be allowed to crumble and disintegrate by an extension of the implied doctrine of immunity.

CONCLUSION.

We respectfully submit that the "cost-plus-a-fixed-fee" contractors are neither agents nor instrumentalities of the Federal Government, that the assessment of taxes in the case at bar is not a direct and immediate or unconstitutional burden on the United States and that the attempt to extend the doctrine of inter-governmental immunity from taxation to private business is in violation of the rights reserved by the states in the Tenth Amendment to the Constitution of the United States.

Respectfully submitted,

EUGENE STANLEY,
Attorney General of the State
of Louisiana;

CICERO C. SESSIONS,
Special Assistant Attorney
General of the State of Louisiana;

AMICI CURIAE.





Office - Supreme Court, U. S.

FILED

OCT 22 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner,

versus

KING AND BOOZER, a partnership composed of
Tom Cobb King and Simon Elbert Boozer,

and

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF ALABAMA.

SUPPLEMENTAL BRIEF OF AMICI CURIAE FOR THE
STATE OF LOUISIANA.

EUGENE STANLEY,

*Attorney General of the
State of Louisiana;*

CICERO C. SESSIONS,

*Special Assistant Attorney General
of the State of Louisiana;*

AMICI CURIAE.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 602

STATE OF ALABAMA, Petitioner,

VS.

**KING AND BOOZER, a partnership composed of
Tom Cobb King and Simon Elbert Boozer,**

and

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF ALABAMA.**

**SUPPLEMENTAL BRIEF OF AMICI CURIAE FOR THE
STATE OF LOUISIANA.**

May It Please the Court:

Since printing and filing of our brief as amici curiae in the above matter, the Supreme Court of the State of Louisiana decided on Friday, October 17, 1941, the case of "*Standard Oil Company of Louisiana v. Rufus W. Fontenot, Director of Revenue of the State of Louisiana; United*

States of America, Intervener", Number 36,309 on the docket of that Court.

The Supreme Court of Louisiana had under consideration in that case transactions similar to those here involved under "cost-plus-a-fixed-fee" contracts executed by contractors with the War Department of the United States.

We desire to supplement our original brief by quoting in its entirety the opinion of the Supreme Court of Louisiana, decided unanimously in the above cited cause, in as much as the opinion has not yet been reported.

The opinion of the Louisiana Supreme Court, as written by the organ of the Court, Mr. Justice Higgins, is as follows:

STANDARD OIL COMPANY
OF LOUISIANA

v.

RUFUS W. FONTENOT,
Director of Revenue of the
State of Louisiana

No. 36,309

SUPREME COURT OF
LOUISIANA.

APPEALED FROM THE NINETEENTH JUDICIAL
DISTRICT COURT, PARISH OF EAST
BATON ROUGE; HONORABLE
CHARLES A. HOLCOMBE,
JUDGE.

Higgins, Justice

The Standard Oil Company of Louisiana, a corporation organized under the laws of this State, engaged as a

dealer in selling gasoline and other petroleum products, instituted this suit under the provisions of Act 330 of 1938, against the Director of Revenue of the State of Louisiana, to recover the sum of \$22,662.55, representing excise taxes claimed to be due the State for the month of December, 1940, and paid under protest by the plaintiff to the defendant. The plaintiff alleged that the sales of gasoline, motor fuel, lubricating oil and kerosene were expressly exempt from the payment of the taxes by certain State statutory provisions because they were made to the Federal Government or its agencies or instrumentalities, and also pleaded the implied constitutional immunity against the imposition of the taxes, stating that it was a direct and immediate burden upon essential governmental operations of the War Department of the United States.

The defendant filed exceptions of no right and no cause of action, which were overruled, and in its answer denied that the sales in question were made by the plaintiff to the United States Government or any agency, department or instrumentality thereof, and that the plaintiff was entitled to constitutional immunity from the taxes as a direct and immediate burden upon the Government or any department or instrumentality thereof; and averred that the sales were made by the plaintiff as the dealer to independent contractors, who had undertaken to construct army camps in Rapides Parish under "cost-plus-a-fixed-fee" contracts with the War Department of the Federal Government and that the Sovereign State of Louisiana, under its reserved constitutional powers, had the right to levy and collect these nondiscriminatory excise taxes.

The United States Government filed a petition of intervention, claiming the State statutory exemptions but

did not plead the implied constitutional immunity from the taxes.

The contractors were not made parties to the suit nor did they intervene therein.

The district judge held that the contractors acted as agencies of the Federal Government in purchasing the gasoline, motor fuel, and lubricating oil and not as independent contractors and, therefore, the statutory exemptions were applicable and the taxes were not due. He was also of the opinion that the taxes on the sales of kerosene—not exempt by any statutory provision—were a direct and immediate burden upon the governmental functions of the United States and, consequently, the taxes were unassessable and uncollectible, because of the implied federal constitutional immunity.

The defendant appealed.

Since the filing of this suit, the plaintiff paid, under protest, identical taxes for subsequent periods, and these taxes have been segregated pending the final outcome of this case.

The taxes sought to be levied and collected by the State of Louisiana in this case are those imposed by Act 6 of the Extra Session of 1928, as amended by Act 1 of the Extra Session of 1930, as amended, (Art. VI-A, Const. of 1921), and Act 87 of 1936, as amended, and Act 15 of the Extra Session of 1934, as amended, and Act 259 of 1938, as amended.

This Court has held that the taxes imposed by some of these statutes are excise taxes placed on dealers in gaso-

line and motor fuel and are not consumers' taxes or "sales taxes"; and that these excise taxes are not laid upon the products but upon the dealer for the right or privilege of selling, using, or consuming the product, and are due and payable immediately upon manufacture or importation of the product for distribution, sale, use, or consumption in this State, and before any transportation, sale, or other disposition thereof. *State v. Sinclair Refining Co.*, 195 La. 288, 196 So. 349; *State v. Standard Oil Co. of La.*, 190 La. 338, 182 So. 531; *State v. Tri-State Transit Co. of La., Inc., et al.*, 179 La. 811, 155 So. 233; *State v. City of Monroe*, 177 La. 983, 149 So. 541; *State v. Tri-State Transit Co. of La., Inc., et al.*, 173 La. 682, 138 So. 507; *State v. Johnson*, 173 La. 669, 680, 138 So. 503. See also, *Trinityfarm Const. Co. v. Grosjean*, 3 F. Supp. 785, 291 U. S. 466, 54 S. Ct. 469.

The statutory exemptions pleaded by the plaintiff and the intervener are contained in the several statutes (under which the taxes are imposed) and are identical, with the exception of the statute levying the dealers' tax on kerosene which does not contain any exemption provision, and read:

"That the tax herein levied shall not apply to sales to the United States Government or to any agency or department thereof. * * *" (1st paragraph of Sec. 13, Act 259 of 1938 and Sec. 14 of Oct 6 of the Extra Session of 1928.)

The case was tried on a stipulation of facts, which substantially sets forth the following:

The S. and W. Construction Company and H. N. Rodgers & Sons Company, partnerships, and Forcum-

James Company, a corporation organized and existing under the laws of the State of Tennessee, all of which are hereafter referred to as the S. and W. Construction Company and associates, and the partnership of W. Horace Williams Company entered into separate "cost-plus-a-fixed-fee" contracts for the construction of complete tent camps and cantonments, etc., at Camp Livingston and Camp Claiborne, near Alexandria, Louisiana, with the United States Government, through the War Department, which was authorized by Acts of Congress providing for national security and the acquisition of facilities and weapons of defense. (Act of June 13, 1940, c. 343, 54 Stat. 350; Act of July 2, 1940, c. 508, 54 Stat. 712.)

The contracts recited that at each camp the estimated total cost of each project was the approximate sum of \$4,242,655., exclusive of the contractors' fixed fee, which, in each instance amounted to the sum of \$155,705. The estimated cost of the work was based upon detailed approximations agreed to by both the Government and the contractors and was subject to the express understanding that the contractors did not guarantee their correctness. The fixed-fee to be paid the contractors was to constitute complete compensation for their services, including profit and all general overhead expense.

Under the terms of Article 1 of the contracts, the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work * * * in accordance with the drawings and specifications or instructions * * * contained in the contracts or furnished by the contracting officers." The title to all work, completed or in

the course of construction, when approved and accepted in writing was to be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site, and upon inspection and acceptance, in writing, by the contracting officers, title to all materials, tools, machinery, equipment and supplies for which the contractors were entitled to reimbursement were to vest in the Government.

Under Article II of the contracts, the contractors were to be reimbursed for such actual expenditures in the performance of the work as were approved and ratified by the contracting officers, including labor, materials, tools, machinery, equipment, supplies, plant, processes, services, power, and fuel necessary for either temporary or permanent use in connection with the work.

In Article III of the contracts the method for making the various payments referred to therein was set forth. With respect to costs, it was provided that the Government was to currently reimburse the contractors upon certification and verification by the contracting officers of the original papers governing payrolls for labor, invoices for materials, and other expenditures.

Article IV of the contracts required the contractors to keep such books and records as were satisfactory to the contracting officers who had the right to inspect them.

The Standard Oil Company of Louisiana was the lowest competitive bidder in response to bids for gasoline, motor fuel, kerosene, tractor fuel and lubricating oil requested by the respective contractors, in accordance with the instructions of the constructing quartermasters, who

were referred to in the contracts as the Government's contracting officers and who were the Government's representatives at the scene of the construction work. During December 1940 the Standard Oil Company sold gasoline and other petroleum products to the contractors, pursuant to orders placed by them with it, for use and consumption in the performance of the contracts.

The constructing quartermasters were not bound to accept the recommendations of the contractors as to the competitive bids for the petroleum products, but could select other bids or require the contractors to secure additional bids. The bids of the Standard Oil Company on the petroleum products were approved by the constructing quartermasters at each camp. After a supply bid had been approved, the contractors, as the occasion required, prepared purchase orders for the materials needed and submitted them to the constructing quartermasters for approval. After each purchase order had been approved by the constructing quartermasters, the contractors forwarded the original orders to the vendor, the Standard Oil Company of Louisiana. Due to the limited storage facilities at the camps, it was necessary that daily purchases be made of petroleum products and, therefore, it was decided by the contractors and the constructing quartermasters that such purchases should be made verbally. Under this procedure, written purchase orders were prepared each week for deliveries made during the previous week. Later, during the month of December, 1940, written purchase orders were prepared on a monthly basis to cover the purchases made during the previous month. The contractors sent the orders to the constructing quartermasters for approval and after their approval, they were sent to the Standard Oil Company. Under this arrangement, it was necessary for the

Standard Oil Company to grant credit to the contractors for weekly and, subsequently, monthly periods. The orders showed that deliveries were to be made f. o. b. Camp Livingston and Camp Claiborne by the vendor's trucks, the shipments being made to the United States Constructing Quartermasters at Alexandria, La., for account of the respective named contractors. On the reverse side of each purchase order, it was stated that the order was "placed for the benefit of and is assignable to the United States Government, * * *" and that the terms of payment were understood to be effective upon arrival at destination and upon acceptance of material by duly accredited officers of the United States, and upon receipt of properly executed bills of lading and invoices. Upon the delivery of products ordered by the contractors from the suppliers, including the Standard Oil Company, at the site of the respective camps, representatives of the contractors and of the constructing quartermasters simultaneously made separate inspections of the products and prepared separate receiving and inspection reports. After the representatives of both the contractors and the constructing quartermasters had made their reports, the two were compared and if they checked in every detail, the representatives of the constructing quartermasters approved the inspection reports prepared by the representatives of the contractors, and the representatives of the contractors approved the inspection reports prepared by the representatives of the constructing quartermasters. The approval and acceptance in each case was indicated by the signing of the reports.

The vendors' invoices were required to be submitted on forms prescribed by the War Department of the United States and when received by the contractors, the contractors' receiving and inspection reports were attached thereto

and forwarded to the constructing quartermasters. In order to obtain the approval of the constructing quartermasters, the invoices were required to check with the receiving and inspection reports. If the receiving and inspection reports of the contractors and of the constructing quartermasters did not agree in every detail, the constructing quartermasters' reports prevailed. When the amounts or quantities appearing on the constructing quartermasters' reports were less than those shown on the contractors' reports, the vendor was notified by the contractors that a shortage existed in the shipment. Unless the vendor could offer satisfactory proof to the constructing quartermasters that the quantities called for had been actually delivered, reimbursement to the contractors was not authorized by the constructing quartermasters. After the constructing quartermasters had inspected each invoice and found it to be correct in every detail, it was approved and returned to the contractors with Form 116 prescribed by the War Department. The approved invoices, upon being returned to the contractors were then forwarded by them to the Standard Oil Company together with a check, with the request that they be dated, marked "paid" and returned. After the receipted invoices were returned to the contractors, a request for reimbursement on Form 1034 prescribed by the War Department was made out by the contractors and sent to the constructing quartermasters, and after their approval, this form was forwarded to the Finance Officer of the War Department, which had jurisdiction over the particular construction project, and, if approved by him, the contractors were then reimbursed by the War Department for the amount paid to the vendor. In some instances, competitive bids for materials required for the performance of the contracts such as fire proof sheeting, boilers, ranges

and steel, were called for directly by the Quartermaster-General. After acceptance by the Quartermaster-General of one of the bids so received, he informed the constructing quartermasters at the respective camps of such acceptance and the constructing quartermasters directed the contractors to place purchase orders for materials covered in the bids for use in connection with the performance of the contracts relating to the particular camp. On some occasions, the constructing quartermaster directed the contractors to place purchase orders for materials needed solely by the constructing quartermasters in the performance of their administrative duties.

Throughout the contracts, the contractors are called contractors and there is neither any language nor any provision directly or indirectly showing that the contracts are ones of employment, or that the contractors are to be considered as agencies or instrumentalities or departments of the Federal Government. Neither do the Acts of Congress which authorize the War Department to enter into the contracts in any way state or indicate that the contractors are to become agencies, instrumentalities or departments of the United States Government. The contractors were not only required to furnish labor and materials, etc., under the provisions of the contracts, but were also required to furnish broad and extensive insurance protection, which is the usual custom in ordinary construction contracts but not in contracts of employment.

In paragraph 2 of Article I of the contracts it is stipulated that the Government shall pay rental for equipment owned by the contractors and that this shall be additional compensation to the contractors over and above the amount

of their fixed-fees and aside from any reimbursement by the Government to the contractors for the latter's expense.

Paragraph 7 of Article II of the contracts provides that the salaries of the contractors' executive officers and the expenses incurred in conducting the contractors' main or branch offices, etc., shall not in any way be borne by the Government, indicating that the Government did not expect nor require the contractors to give up their private businesses in which they were engaged and to devote their services and time exclusively to the Government.

In paragraph 8 on the same page of the contracts, the contractors were required to take all available and personal cash discounts, allowances, rebates, etc., thus indicating that the contractors and not the Government had entered into contractual relationship with the suppliers and vendors for various articles, materials and supplies to be used in fulfilling the contracts with the Government.

Article V of the contracts is captioned "Special requirements" and under sub-paragraph 1 (b) thereof, the contractors are required to produce all necessary permits and licenses, which an agency or department of the Government would not be required to obtain. For example, public owned motor vehicles are not subject to motor license laws in this State. In that same Article, the contractors are required to make all contracts in their own names and not bind or purport to bind the Government or the contracting officer of the Government thereunder.

The Government did not purchase the petroleum products in question directly from the Standard Oil Company and tax exemption certificates on Form 1094 were

not furnished. The Government's representatives knew that the contractors called for the bids as they were directed to do by them and as a result thereof had entered into the contracts for the purchase of the petroleum products from the Standard Oil Company, which granted extensive credit to the contractors and that the vendor looked solely and only to them for payment and in no way considered that the War Department or the Federal Government was in any way bound to pay the vendor. It also appears in the record that the plaintiff declined to bill or invoice the contractors for supplies sold and delivered to them and to certify that State or local taxes had been excluded.

On the reverse side of the purchase order furnished by the Government and required to be used by the contractors, the following language is printed: "This order is placed for the benefit of, and is assignable to the United States Government. This purchase order does not bind nor purport to bind the United States Government or officers thereunder."

In the second paragraph (d) on the reverse side of the same order there appears: " * * * and that State or local sales taxes are not included in the amounts billed."

The Standard Oil Company refused to execute the certificate, although the taxes in question are neither State nor local sales taxes.

Article II of the contracts provides generally for reimbursement for the contractors' expenditures and subparagraph (m) specifically establishes the Government's liability therefor, as follows:

"Payments from his own fund made by the contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the contractor may be required on account of this contract to pay on or before any plant equipment, process organization, materials, supplies, personnel; and, if approved in writing by the contracting officer in advance, permit and license fees, and royalties on patents used including those owned by the contractor."

In the case of *Six Cos. v. DeVinney*, 2 F. Supp. 693, the plaintiff sought to enjoin the County Assessor from collecting personal property taxes from it on the ground that the property was located within the Federal Reservation and that the plaintiff was an instrumentality of the Federal Government. In dismissing the appeal and holding that the contractor was not an instrumentality of the Government, it was stated:

"* * *The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. * * *"

In the case of *Boeing Airplane Co., et al. v. State Commissioner of Revenue and Taxation, et al.*, 113 Pac. 2nd, 110, the Supreme Court of Kansas had under considera-

tion the contract between an airplane manufacturing company and the Federal Government to enlarge the company's plant facilities and equip them for the exclusive purpose of making airplanes for the Government, which agreed to reimburse the company for cost of such enlargements. The questions of federal agency or instrumentality and immunity from taxation were involved. On the first point, the holding of the Court was set forth, as follows:

"Where an airplane manufacturing company makes a contract with the federal government to enlarge its plant facilities and to equip them for the exclusive purpose of making airplanes for the government, and where the government agrees to reimburse the airplane company for the cost of such enlarged facilities and their equipment in 60 monthly payments upon audited statements thereof, and where after such 60 monthly payments are completed, such facilities and equipment will become the property of the government subject to an option in favor of the airplane company for their acquisition, it is held that the equipment purchased within this state for installation in aforesaid facilities is subject to the two percent sales tax, and where such equipment is purchased outside the state to be installed and used in the enlarged airplane plant facilities it is subject to the compensating use tax; and in neither case are the purchases so made exempt from such taxation on the ground that they are governmental agencies or instrumentalities or on any other theory of constitutional or statutory law."

In *Buckstaff Bath House Co. v. McKinley, et al.*, 60 S. Ct. 279, 308 U. S. 358, the plaintiff corporation operated a bath house on the United States Reservation known as Hot

Springs National Park, under lease from the Secretary of Interior of the United States Government, by the terms of which the operation and use of the bath house facilities, the number of bath tubs used, charges to the public, qualifications of employees, maintenance and care of the premises, prohibition of employment of agents to solicit patronage and the authority over the assignment or transfer of the lease were subject to certain control by the Department of Interior. The Supreme Court of the United States, with Mr. Justice Douglas as its organ, stated that the corporation was engaged in business in its own behalf for profit and that the mere fact it conducted its business under a contract with the Secretary of the Interior did not convert it into an instrumentality of the Government. It was pointed out that although the corporation acted with the Government's permission and had received a privilege from the Government, it did not exercise the privilege on behalf of the Government and that the control reserved by the Government for the protection of a governmental program and the public interest was not incompatible with the retention of the status of a private enterprise. The control which was reserved and exercised did not differ from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality.

In the case of *Federal Compress and Warehouse Company v. McLean*, 54 S. Ct. 267, 291 U. S. 17, 78 L. Ed. 622, the State of Mississippi levied a nondiscriminatory State license tax on the business of operating cotton warehouses and compresses under the provisions of the Federal Warehouse Act. It was held that although the Government exercised control over the business, the license from the Department of Agriculture did not confer upon the

company immunity from State taxation, nor was it converted into an agency or instrumentality of the Federal Government but that in the enjoyment of the privilege it was engaged in its own behalf in the conduct of a private business for profit. It was stated that the enjoyment of such a privilege conferred by either the national or a state government, upon an individual, even though it promotes some governmental policy, does not relieve him from the tax burden under the doctrine of sovereign immunity therefrom.

In the case of *Commissioner of Internal Revenue v. Modjeski*, 75 Fed. (2d) 468, the Court stated that a consulting engineer employed by the Delaware River Joint Commission was an independent contractor and not an agent or instrumentality of the State of Delaware and, therefore, not exempt from the payment of Federal Income Tax.

In *Helvering v. Gerhardt*, 58 S. Ct. 969, 304 U. S. 405, the Court held that the salaries of employees of the New York Port Authority were subject to Federal Income Tax under the theory that the activities of a corporation created as a State agency, which were not essential to the preservation of State government, were not exempt from federal taxation, and rejected the defense based on the doctrine of agency or instrumentality of the State government. The converse of this issue was involved in the case of *Utah Tax Commission v. Van Cott*, 59 S. Ct. 605, 306 U. S. 511.

In *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, the plaintiff had contracts with the United States Government for the construction and maintenance of levees in Louisiana for the control of

the waters of the Mississippi River and sought a reversal of the judgment upholding the State's right to levy and collect excise taxes upon all gasoline or motor fuel sold or used and consumed in the State, on the ground that the contracts were federal improvements or instrumentalities; and that the enactment referred to imposed a direct burden upon them and that the State was, therefore, without power to impose the tax. The Supreme Court held that the contractor was not an agent or instrumentality of the United States but was an independent contractor. See also, *Graves v. People of New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 120 A. L. R. 1466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172; *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 25 S. Ct. 50; *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 114 A. L. R. 318; *Silas Mason Company v. Tax Commission of Washington*, 302 U. S. 186, 58 S. Ct. 233.

In the case of *Standard Oil V. Lee*, 199 So. 325, the State of Florida sought to impose its gasoline sales tax upon a contractor who entered into an agreement with the Federal Government, through the Naval Department, to construct a naval air station at Jacksonville, on a "cost-plus-basis", which the Attorney-General of this State has assured us was a "cost-plus-a-fixed-fee" contract. The Court concluded that the contractor was not performing any governmental function and was an independent contractor and, therefore, subject to the tax which was not an immediate or direct burden upon the Federal Government, although the Government did pay the tax as a part of the purchase price of the materials.

While the following cited cases do not deal specifically with governmental "cost-plus" contracts, they do show that

the weight of authority is that the status of contractors under similar contracts is one of independence and not agency. See: *Annotations in 2 A. L. R. 126 and 27 A. L. R. 48*; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Baumann v. West Allis*, 187 Wis. 506, 204 N. W. 907; *J. D. McCrary Engineering Co. v. White Coal Power Co.*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. (2d) 143 (Cal. App.*); *Allen v. Republic Building Co.*, 84 S. W. (2d) 506 (Tex. Civ. Ap.)

The foregoing jurisprudence is consistent with that in the field of damage suits where it has been held that under similar contracts an agency was not created thereby.

In *Casement, et al. v. Brown, et al.*, 148 U. S. Rept. 615, the plaintiff sued to recover the value of three barges of coal, lost, as claimed, through the negligence of the defendants. In holding that the defendants were independent contractors, and not employees of the company, and, as such, were liable for damages caused by their own negligence, the Court stated:

"With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. They selected their own servants and employees. Their contract was to produce a specific result. They were to furnish all the ma-

materials and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. * * *

See also: *Krause v. Revelson*, 155 N. E. 137, 115 Ohio 594; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Crown City Lodge I. O. O. F. v. Industrial Accident Com.*, 51 Pac. (2d) 143 (Cal. App.) and *Allen v. Republic Bldg. Co.*, 84 S. W. (2d) 506 (Tex. Civ. App.)

Furthermore, there is nothing in the stipulation of facts that sets forth that any of the corporation or the partnerships contractors here involved, even if they were eligible to qualify as agents or employees of the Federal Government (which is doubtful under the general laws of the United States, 40 U. S. C. A. 270 A, *Helvering v. Powers*, *Walsh-Healey Act* 49 Stat. at L. 2036—Public Act 846—74th Congress, 293 U. S. 214, 55 S. Ct. 171) have complied with any of the formalities required by law or qualified as officers of the Federal Government.

The plaintiff and the intervener assert that the authority for the execution of the contracts are two Acts of the 76th Congress, namely, Public Act 703, approved July 2, 1940, 54 Stat. 712 and Public Act 611, approved June 13, 1940, 54 Stat. 350. It appears that attempts were made to amend proposed legislation to provide for a specific ex-

emption from State taxes for contractors under a "cost-plus-a-fixed-fee" contract, and to legislate them into the status of an agency representing the sovereign nation. It was sought to amend Public Act 43 (53 Stat. at L. 590-92) so as to provide that all contractors who entered into authorized contracts should be held to be agents of the United States for the purpose of such contracts. The Act was passed without the proposed amendment. Prior to the passage of Public Act 588 of the 76th Congress, the language therein, which would have made such contractors agents of the government and would have exempted them from all taxes—federal, state and local, it was stricken therefrom in the House and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-35, Amd't. 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, page 7646-48. Therefore, when the War Department entered into the contracts in question, it was with full knowledge that Congress had refused to make such contractors agents or instrumentalities of the Government and that Congress had likewise refused to make available to such contractors a specific statutory exemption from State and local taxes. The clauses and stipulations in the "cost-plus-a-fixed-fee" contracts in question, giving the Government greater control and supervision of the contractors than is usually found in contracts with independent contractors on a "lump sum" basis, are therefore shown to have been placed in the contracts by the Government for its protection against imposition or overcharge and not for the purpose of making these contractors agencies, instrumentalities or departments of the United States Government.

The question of whether or not a contractor under the law is an independent one or an agent depends upon the intention of the parties as expressed in the contract. The

usual independent contractor is the one who is the lowest bidder on a lump-sum basis. He depends for his profit or gain upon the difference between the amount that the materials, labor, etc., cost him and the amount of the contract price. The independent contractor on a "cost-plus-a-percentage-of-cost" basis is one who undertakes the construction required by the contract and the owner reimburses him for the costs of materials, labor, etc., and the contractor's profit or gain is to be a certain percentage of the total cost of the project. These types of contractors are legally classified as independent contractors. The third or new type of contract is called a "cost-plus-a-fixed-fee" contract, which means that the contractor is to be reimbursed for the costs of materials, labor, etc. by the owner and is to receive a fixed fee as his profit or gain. This fee, which is fixed as his profit or gain for the performance of the contract, is identical with the profit or gain which the contractor on a "cost-plus-a-percentage-of-the-cost" contract receives in respect that neither contractor takes any chance of losing. The profit or gain on a "cost-plus-a-fixed-fee" contract is dissimilar from the profit or gain on a "cost-plus-a-percentage-of-the-cost" contract only in the respect that the amount is not exactly determined in advance. The only difference between the "cost-plus-a-fixed-fee" and the "cost-plus-a-percentage-of-the-cost" contract on the one hand, and a "lump sum" contract on the other, is that in the two former cases, the contractor's profit or gain is assured, whereas, on a "lump-sum" contract, it is possible that the anticipated and expected profit may turn into a loss because of a low bid or advances in the prices of materials or the cost of labor. In all three types of contracts, however, the contractor is certainly an independent contractor, if the provisions of the contract make him so and do not in any way indicate or state that

the parties intended that it was a contract of employment or agency or that the contractor was an instrumentality of the Government. In all of the above cases, the contractor operates his business for his own profit and gain. He is not performing governmental functions and has no authority to, in anyway, bind the owner or Government either for the purchase of the materials or for the hiring of labor.

In the instant case, we have shown that it was not the intention of the parties to name or designate the contractors as agencies, instrumentalities or departments of the United States Government. The Debates in the House of Representatives conclusively show that Congress withheld such status from these types of contractors, as reference to the Congressional Records will reveal. Cong. Rec., Vol. 86, Part. 7, pages 7532-35, in the Debates of June 4, 1940. Since Congress did not make such contractors agencies of the Federal Government, then clearly the War Department, as the representative of the Government, in carrying the legislation into practical effect, did not intend to do so in making the contracts with them.

A fundamental rule of statutory construction is that statutes granting tax exemptions are to be strictly construed because they grant an exceptional privilege, and the right to enjoy the exemption must be clearly, unequivocally and affirmatively established. *Hibernia National Bank, et al. v. Louisiana Tax Commission*, 195 La. 43, 196 So. 15; *Pearce, et al. v. Couvillion*, 164 La. 155, 113 So. 801; and *Louisiana and N. W. R. co. v. State Board of Appraisers*, 108 La. 14, 32 So. 184.

The exemption from the State taxes in question by the United States Government was expressly and clearly

granted when the sales were made to the United States Government, or any agency of the Government, or any department of the Government. The statute does not grant the exemption in favor of the United States Government where the sales are made to a contractor who entered into a contract with the United States Government to perform work, unless the contract or the authority under which the contract was entered into shows clearly, positively and definitely that the contractor was designated, and enjoyed the status of, an agency, instrumentality, or department of the Government. The agencies, instrumentalities and departments of the Government necessarily perform governmental functions. The contractors in this case were not employed to give their full service, time and effort to the performance of the work, but undertook to build and erect the camps and improvements required by the plans and specifications furnished by the Government. The contract did not bind or require them to perform any governmental functions or operations and they entered into the contracts for profit and gain, represented by a fee predicated upon the amount of work and responsibility involved. We do not think that, even by a liberal construction of the State statute, the facts of this case bring the taxes in question within the statutory exemption, because it is most difficult to imagine an agency or department of the United States Government without any capacity, ability or right to in any way bind the Federal Government, as the agreed statement of facts shows that the contractors in the instant case were incapable of doing.

The attorneys for the Government and the Standard Oil Company have tried to limit a consideration of the issue to the facts dealing strictly with the purchase of the petroleum products. The defendant, Director of Revenue, has

taken in the full scope of the contracts to show the true legal status of the contractors. The best that can be said for the plaintiff's and the intervenor's contention is that the contractors in the instant case, since the work was done on a "cost-plus-a-fixed-fee" basis, were under very strict supervision, direction and control in order that the Government could protect itself against unnecessary and excessive expenditures of money for materials and labor to be used by the contractors in connection with the performance of the contracts. These circumstances are certainly insufficient to show that the contractors were mere purchasing agents of the War Department of the Government. On the contrary, the defendant has shown that the contractors were obligated to furnish both materials and labor for the performance of the work and that the materials purchased by the contractors were to be paid for by them to the vendors and suppliers and that the Government, upon inspection and approval thereof, would reimburse the contractors for the cost of them. The vendors had no contractual relations whatsoever with the Government and the Government was not in any way liable to them, but was solely and only liable to the contractors for reimbursement for materials accepted by its representatives. The fact that the Government had the right to have the contracts for purchases of the materials by the contractors from the vendors assigned to its negatives any idea that the contractors were the agents of the Government, because, if the contractors were agents or representatives of the Government, an assignment of the contracts and orders for purchases from the suppliers would have been unnecessary. The United States Government unquestionably had the right through any of its agencies or departments to purchase materials and supplies and thus be entitled to the statutory exemption, but the Government elected not to do

so. It entered into contracts with the partnerships and the corporation engaged in business for profit for the purpose of erecting the improvements desired at the camps and, having failed to name the contractors as agents or to establish them as departments of the Government, it appears to us that the United States Government, acting under Congressional Acts, through the War Department, represented by the Quartermaster-General, has proceeded in a way so as not to take advantage of these exemptions, apparently as a matter of policy, realizing that there would be a serious disturbance and impairment of the fisc of the State, aside from the fact that great risks would result from such contractors having the power and authority as agents or departments to bind and obligate the Federal Government.

Considering the facts herein and the above referred to jurisprudence, it is our opinion that the contractors were not agents, instrumentalities or departments of the United States Government within the meaning of the Louisiana statutory exemptions.

The Standard Oil Company has relied on the cases of *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 48 S. Ct. 451, *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, *Case-ment v. Brown*, 148 U. S. 615, 13 S. Ct. 672, and *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 S. Ct. 601. These cases are to be distinguished from the instant one because the Court found, for instance, in the *Panhandle Oil Company v. Mississippi* and the *Graves v. Texas Co.* cases that the sales were directly to the United States Government. Furthermore, the cases have been distinguished and must be deemed limited to their specific facts, which were not the same as the facts established in this case.

In the case of *King & Boozer v. State*, 3 So. (2d) 572, also cited by the plaintiff and the intervener, the Supreme Court of Alabama, by a divided Court, held, in annulling the judgment of the Circuit Court, that the contractor under a "cost-plus-a-fixed-fee" contract was the agent for the Government in purchasing the lumber in question and, therefore, the sale was direct to the United States for its exclusive use and benefit and not for the contractors and, therefore, the sales tax was a direct and immediate tax burden on the Federal Government and its instrumentalities. This case was followed by the same Court in *United States v. Curry*, 3 So. (2d) 582. We are informed by counsel that the Attorney-General of the United States has joined in an application asking the Supreme Court of the United States to review the cases on writs of certiorari. It is our opinion that the provisions of the contract in that case, which appear to be identical with those in the instant case, are inconsistent with any conclusion that the contractor was the agent or instrumentality of the Federal Government, purchasing directly for the Government the lumber in question. The contractor there, as here, was purchasing the materials for his own account for the purpose of fulfilling the contract and until the Government accepted the materials from him, he was the owner thereof and he was solely and only responsible and liable to pay the furnisher of the materials. Furthermore, in our opinion, the conclusions reached in these cases, are not in accord with the above outlined jurisprudence but are in keeping with the cases which we have pointed out have been restricted to their own facts or impliedly overruled.

Although the intervener, the United States, neither pleaded nor claimed the implied constitutional immunity against the taxes as a direct and immediate burden upon

governmental operations of the United States, the plaintiff, the Standard Oil Company, raised and pressed this issue. Since the United States has elected not to urge constitutional immunity against the taxes, it is clear that the Standard Oil Company, a Louisiana corporation and a dealer in petroleum products within the meaning of the taxing statute, does not have the right to do so, because the immunity is peculiar to the United States on account of its status as a Sovereign Nation. The Standard Oil Company, of course, enjoys no such position. The implied constitutional immunity in favor of the Federal Government against State taxes which are a direct and immediate burden upon governmental operations is a right which the United States has in no way even attempted to directly or indirectly authorize the Standard Oil Company to assert, if such authorization were permissible. It must also be borne in mind that the contractors to whom the plaintiff sold the petroleum products are not before the Court and that the Standard Oil Company does not even pretend that the United States Government is liable for the purchase price of the products sold to the contractors, or that it had any contractual relations whatever with the United States Government.

In the case of *Rome v. London & Lancashire Indemnity Company*, 160 So. 132 (*writ refused*), 181 La. 630, 160 So. 121, 157 So. 175, 156 So. 64, this Court held that the immunity of the State government or any of its subdivisions against liability for tort arising out of the negligence of its representatives or employees while engaged in governmental functions was confined to them and could not be pleaded as a defense by the insurance liability carrier of the governmental subdivision.

In the case of *Edwards v. Royal Indemnity Company*, 182 La. 171, 161 So. 191, we held that the plea of coverture available to the husband to defeat recovery by his wife for injuries resulting from his negligent operation of an automobile, before their marriage, was a personal defense which was not available to the husband's liability insurer in an action brought by the wife directly against the insurer. This immunity from liability for such a suit resulted under our law from the status of the parties as husband and wife during the marriage.

The foregoing authorities are adverse to plaintiff's position and are decisive of the issue that it does not have the right to plead constitutional governmental immunity against the taxes. However, since an important federal question is involved and the defendant has not interposed any objection to the plaintiff raising this issue and has squarely met the allegations of the petition that the taxes are a direct and immediate burden on governmental operation by denying them and asserting that the taxes are remote and consequential and that the contractors were not agencies or instrumentalities of the United States Government but were independent contractors, we shall consider this point. It must be remembered that the contractual relationship was solely between the contractors and the Standard Oil Company for the purchase of the petroleum products and that the contractors purchased these products for their own account to perform their contracts and were solely and only liable to the vendor for their purchase price. As between the vendor and the contractors upon their acceptance of the petroleum products, title passed to each of them respectively and upon acceptance and approval by the constructing quartermasters, the title then vested in the Federal Government with the obligation to reimburse the

contractors for the full purchase price thereof, including all applicable State and local taxes. The statutes expressly lay the tax burden on the Standard Oil Company as a dealer in petroleum products and does not place any liability whatsoever upon the contractors, as purchasers thereof, for the taxes. There is no doubt that the vendor added the taxes into the purchase prices which were paid for the petroleum products.

In the case of *Railroad Company v. Peniston*, 18 Wall. 5, the United States Supreme Court said:

"All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, * * *

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. * * *

In the case of *Baltimore Ship Building & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 25 S. Ct. 50, the Court said:

"* * * it seems to us extravagant to say that an independent private corporation for gain is created by a state, exempt from state taxation; either in its corporate business or its property, be-

cause it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, the plaintiff sought to avoid the payment of the tax due on gasoline sold and used by it in performing its contracts with the United States Government to construct levees. The implied constitutional immunity doctrine was invoked. The Court, after concluding that the contractor was an independent one, held:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River and to authorize the performance of the work directly by the government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. * * * Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of

appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. * * * Appellant's claim of immunity is without foundation."

It will be noted in that case that the contractor itself was before the Court pleading its governmental agency and instrumentality with the resulting tax immunity, which was denied by the Court, whereas, in the instant case, neither the contractors themselves nor the Government is before us urging that point.

In *Standard Oil Company v. Lee*, 199 So. 325, (Fla.) which involved a contract on a "cost-plus-basis" (a "cost-plus-a-fixed-fee" contract), the Court said:

"The test of validity of the tax in these cases is not whether it is laid directly on the United States or one of its governmental agencies but whether or not in the way laid, it directly retards, impedes, or burdens the United States in the exercise of its constitutional powers. It cannot be questioned that the tax here falls ultimately on the federal government. The contractors are agencies of the latter, executing a contract for profit; they do not perform any governmental functions. The burden of the federal government is consequential and remote. It increases the cost to the government but when accomplished in this manner, the federal cases appear to sanction the contract. * * *

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, the Court upheld a percentage tax on the contractor's gross receipts from a contract with the United

States. The contract provided for partial payments as the work progressed and that all the materials covered by the partial payments should " * * * thereupon become the sole property of the Government." The West Virginia statute was held inapplicable to the gross receipts resulting from business in the State of Pennsylvania and outside of the State of West Virginia, but applicable and valid as to the portion derived from its activities within the State. The Court said:

" * * * The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of the government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

* * * * *

" * * * Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States. 'Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.' Thomson v. Union P. R. Co., 9 Wall. 579, 591, 19 L. ed. 792, 798.

* * * * *

"But if it be assumed that the gross receipts tax may increase the cost to the government that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross re-

ceipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery, but on the fuel used to operate it. * * * But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the government. The fact that the tax on the gross receipts of the contractor in the *Alward Case*, *supra*, might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity."

In *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273 it was held that a nondiscriminatory license tax upon an automotive transportation company was not prohibitive in an instance where the United States mails were transported.

In *Silas Mason Co. Inc. et al. v. Tax Commission of the State of Washington*, 302 U. S. 186, 58 S. Ct. 233, it was held that there was no unconstitutional burden upon the Federal Government in the imposition of the occupational license tax levied by the State of Washington when applied to the gross income of contractors on the construction and excavation in completing the Grand Coulee Dam and power plant. See also: *Boeing Airplane Co. v. State Commission of Revenue*, 113 Pac. 110, *supra*.

The excise or dealers' taxes in the instant case are not laid and do not fall either upon the contractors or the

United States Government but upon the Standard Oil Company and, therefore, are only remote and consequential in their effect upon the Federal Government.

Is it our opinion that the contractors under the "cost-plus-a-fixed fee" contracts in this case are independent contractors; that the petroleum products were sold to them by the Standard Oil Company as such and not as agents, employees, representatives or instrumentalities of the United States Government; that the taxes in question did not immediately and directly burden the Federal Government's operation; that, if the taxes affected the Government at all, it was consequential and remote, in that the tax burden was placed directly and solely and only upon the Standard Oil Company as a dealer; and that, if the taxes or any part thereof were passed on as a part of the purchase price to the contractors and they, in turn, passed them on to the Government as a part of the cost for reimbursement, under the decisions of the Supreme Court of the United States this is not a violation of the implied constitutional immunity of the Sovereign Government of the United States against State and local taxes.

The Standard Oil Company, in the alternative, pleaded that the sales by it to the contractors were wholesale sales which were followed by retail sales by the contractors to the Federal Government and, therefore, the taxes were not due. The Government did not join in raising this issue, apparently realizing that it was inconsistent with its position that the sales were directly to the United States Government, its agencies, or representatives. The trial court did not pass upon this point. There is no doubt that under the contracts and the law that title to the petroleum prod-

ucts passed from the Standard Oil Company to the contractors when they purchased and accepted delivery of these products and that the title passed from the contractors to the United States Government when its representatives checked and accepted them and ordered the contractors reimbursed therefor. This, of course, is consistent with the defendant's position that the contractors were independent contractors and that the taxes were not a direct and immediate burden upon federal government operations but consequential and remote. The alternative plea of the plaintiff avails it nothing because under the provisions of the statutes and the jurisprudence, wholesale as well as retail sales are covered by the statutes and the dealer is made liable for the taxes. *State v. Sinclair Refining Co.*, 195 La. 288, 196 So. 349.

The issues raised by the plaintiff, the Standard Oil Company, and the intervener, the United States Government, that as to the levy of the State taxes on products delivered in the State areas which are owned in fee-simple by the United States Government or leased by it—the sites where the camps are located—the tax laws in question are void and of no effect under Article 1, Section 8, Clause 17 and Article 6, Section 1 of the 14th Amendment of the Constitution of the United States, have been abandoned by them.

The conclusion which we have reached in favor of the State Collector of Revenue, formerly the Director of Revenue—that the taxes in question were validly levied and collected from the Standard Oil Company, as a dealer, makes it unnecessary for us to consider the State's contention whether the attempt to extend the mantle of govern-

mental immunity from State and local taxation to private businesses simply because of contractual relations with the United States Government, is unconstitutional and in violation of the reserved rights of the State of Louisiana and an invalid invasion of the reserved constitutional powers of the Sovereign State of Louisiana to levy and collect nondiscriminatory taxes.

For the reasons assigned, the judgment appealed from is annulled, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant, Rufus W. Fontenot, Collector of Revenue of the State of Louisiana, formerly the Director of Revenue of the State of Louisiana, and against the plaintiff, the Standard Oil Company of Louisiana, and the intervener, the United States Government, rejecting their demands.

CONCLUSION

We submit that on the question of agency, the decision of the Louisiana Supreme Court, following, as it does, the decisions of the Supreme Court of Florida in *Standard Oil Company v. Lee*, 199 So. 325, and the Supreme Court of Kansas in *Boeing Airplane Company, et al v. State Commissioner, etc.*, 113 Pac. 2nd. 110, is clearly indicative of the error into which the Supreme Court of Alabama fell in the case at bar. Mr. Justice Higgins' analysis of the true relationship of the parties, as set out in the opinion above quoted, is peculiarly applicable to the facts in the case at bar, and clearly indicates the errors into which the Supreme Court of Alabama has fallen. The proper conclusion is that reached by the Supreme Court of Louisiana, and that is, that a contractor in a "cost-plus-a-fixed-fee"

contract is independent, and is neither an agent nor an instrumentality of the United States.

Respectfully submitted,

EUGENE STANLEY,
*Attorney General of the
State of Louisiana;*

CICERO C. SESSIONS,
*Special Assistant Attorney General
of the State of Louisiana;*

AMICI CURIAE.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, individually and as Commissioner of
Revenue of the State of Alabama, Petitioner,

versus

UNITED STATES OF AMERICA and DUNN CON-
STRUCTION COMPANY, INC. and JOHN H. HODG-
SON & COMPANY, partners, doing business as DUNN
CONSTRUCTION COMPANY, INC. AND JOHN H.
HODGSON & COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF ALABAMA.

SUPPLEMENTAL BRIEF OF AMICI CURIAE FOR THE
STATE OF LOUISIANA.

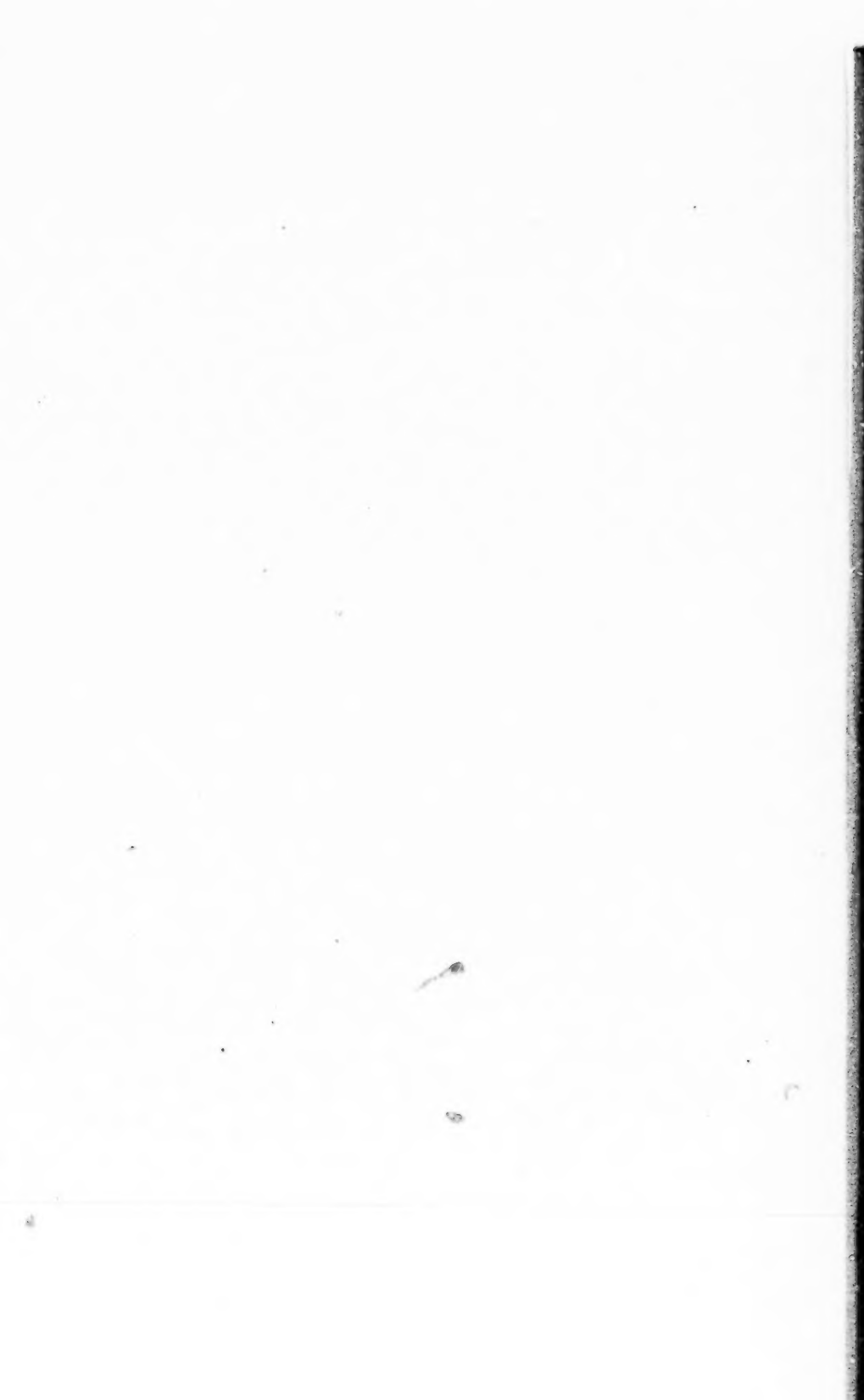
EUGENE STANLEY,

*Attorney General of the
State of Louisiana;*

CICERO C. SESSIONS,

*Special Assistant Attorney General
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AMICI CURIAE.



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**ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF ALABAMA.**

**SUPPLEMENTAL BRIEF OF AMICI CURIAE FOR THE
STATE OF LOUISIANA.**

May It Please the Court:

Since printing and filing of our brief as amici curiae in the above matter, the Supreme Court of the State of Louisiana decided on Friday, October 17, 1941, the case of "*Standard Oil Company of Louisiana v. Rufus W. Fontenot, Director of Revenue of the State of Louisiana; United*

States of America, Intervener", Number 36,309 on the docket of that Court.

The Supreme Court of Louisiana had under consideration in that case transactions similar to those here involved under "cost-plus-a-fixed-fee" contracts executed by contractors with the War Department of the United States.

We desire to supplement our original brief by quoting in its entirety the opinion of the Supreme Court of Louisiana, decided unanimously in the above cited cause, in as much as the opinion has not yet been reported.

The opinion of the Louisiana Supreme Court, as written by the organ of the Court, Mr. Justice Higgins, is as follows:

STANDARD OIL COMPANY
OF LOUISIANA

v.

RUFUS W. FONTENOT,
Director of Revenue of the
State of Louisiana

No. 36,309

SUPREME COURT OF
LOUISIANA.

APPEALED FROM THE NINETEENTH JUDICIAL
DISTRICT COURT, PARISH OF EAST
BATON ROUGE; HONORABLE
CHARLES A. HOLCOMBE,
JUDGE.

Higgins, Justice

The Standard Oil Company of Louisiana, a corporation organized under the laws of this State, engaged as a

dealer in selling gasoline and other petroleum products, instituted this suit under the provisions of Act 330 of 1938, against the Director of Revenue of the State of Louisiana, to recover the sum of \$22,662.55, representing excise taxes claimed to be due the State for the month of December, 1940, and paid under protest by the plaintiff to the defendant. The plaintiff alleged that the sales of gasoline, motor fuel, lubricating oil and kerosene were expressly exempt from the payment of the taxes by certain State statutory provisions because they were made to the Federal Government or its agencies or instrumentalities, and also pleaded the implied constitutional immunity against the imposition of the taxes, stating that it was a direct and immediate burden upon essential governmental operations of the War Department of the United States.

The defendant filed exceptions of no right and no cause of action, which were overruled, and in its answer denied that the sales in question were made by the plaintiff to the United States Government or any agency, department or instrumentality thereof, and that the plaintiff was entitled to constitutional immunity from the taxes as a direct and immediate burden upon the Government or any department or instrumentality thereof; and averred that the sales were made by the plaintiff as the dealer to independent contractors, who had undertaken to construct army camps in Rapides Parish under "cost-plus-a-fixed-fee" contracts with the War Department of the Federal Government and that the Sovereign State of Louisiana, under its reserved constitutional powers, had the right to levy and collect these nondiscriminatory excise taxes.

The United States Government filed a petition of intervention, claiming the State statutory exemptions but

did not plead the implied constitutional immunity from the taxes.

The contractors were not made parties to the suit nor did they intervene therein.

The district judge held that the contractors acted as agencies of the Federal Government in purchasing the gasoline, motor fuel, and lubricating oil and not as independent contractors and, therefore, the statutory exemptions were applicable and the taxes were not due. He was also of the opinion that the taxes on the sales of kerosene—not exempt by any statutory provision—were a direct and immediate burden upon the governmental functions of the United States and, consequently, the taxes were unassessable and uncollectible, because of the implied federal constitutional immunity.

The defendant appealed.

Since the filing of this suit, the plaintiff paid, under protest, identical taxes for subsequent periods, and these taxes have been segregated pending the final outcome of this case.

The taxes sought to be levied and collected by the State of Louisiana in this case are those imposed by Act 6 of the Extra Session of 1928, as amended by Act 1 of the Extra Session of 1930, as amended, (Art. VI-A, Const. of 1921), and Act 87 of 1936, as amended, and Act 15 of the Extra Session of 1934, as amended, and Act 259 of 1938, as amended.

This Court has held that the taxes imposed by some of these statutes are excise taxes placed on dealers in gaso-

line and motor fuel and are not consumers' taxes or "sales taxes"; and that these excise taxes are not laid upon the products but upon the dealer for the right or privilege of selling, using, or consuming the product, and are due and payable immediately upon manufacture or importation of the product for distribution, sale, use, or consumption in this State, and before any transportation, sale, or other disposition thereof. *State v. Sinclair Refining Co.*, 195 La. 288, 196 So. 349; *State v. Standard Oil Co. of La.*, 190 La. 338, 182 So. 531; *State v. Tri-State Transit Co. of La., Inc., et al.*, 179 La. 811, 155 So. 233; *State v. City of Monroe*, 177 La. 983, 149 So. 541; *State v. Tri-State Transit Co. of La., Inc., et al.*, 173 La. 682, 138 So. 507; *State v. Johnson*, 173 La. 669, 680, 138 So. 503. See also, *Trinityfarm Const. Co. v. Grosjean*, 3 F. Supp. 785, 291 U. S. 466, 54 S. Ct. 469.

The statutory exemptions pleaded by the plaintiff and the intervener are contained in the several statutes (under which the taxes are imposed) and are identical, with the exception of the statute levying the dealers' tax on kerosene which does not contain any exemption provision, and read:

"That the tax herein levied shall not apply to sales to the United States Government or to any agency or department thereof. * * *" (1st paragraph of Sec. 13, Act 259 of 1938 and Sec. 14 of Oct 6 of the Extra Session of 1928.)

The case was tried on a stipulation of facts, which substantially sets forth the following:

The S. and W. Construction Company and H. N. Rodgers & Sons Company, partnerships, and Forcum-

James Company, a corporation organized and existing under the laws of the State of Tennessee, all of which are hereafter referred to as the S. and W. Construction Company and associates, and the partnership of W. Horace Williams Company entered into separate "cost-plus-a-fixed-fee" contracts for the construction of complete tent camps and cantonments, etc., at Camp Livingston and Camp Claiborne, near Alexandria, Louisiana, with the United States Government, through the War Department, which was authorized by Acts of Congress providing for national security and the acquisition of facilities and weapons of defense. (Act of June 13, 1940, c. 343, 54 Stat. 350; Act of July 2, 1940, c. 508, 54 Stat. 712.)

The contracts recited that at each camp the estimated total cost of each project was the approximate sum of \$4,242,655., exclusive of the contractors' fixed fee, which, in each instance amounted to the sum of \$155,705. The estimated cost of the work was based upon detailed approximations agreed to by both the Government and the contractors and was subject to the express understanding that the contractors did not guarantee their correctness. The fixed-fee to be paid the contractors was to constitute complete compensation for their services, including profit and all general overhead expense.

Under the terms of Article 1 of the contracts, the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work * * * in accordance with the drawings and specifications or instructions * * * contained in the contracts or furnished by the contracting officers." The title to all work, completed or in

the course of construction, when approved and accepted in writing was to be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site, and upon inspection and acceptance, in writing, by the contracting officers, title to all materials, tools, machinery, equipment and supplies for which the contractors were entitled to reimbursement were to vest in the Government.

Under Article II of the contracts, the contractors were to be reimbursed for such actual expenditures in the performance of the work as were approved and ratified by the contracting officers, including labor, materials, tools, machinery, equipment, supplies, plant, processes, services, power, and fuel necessary for either temporary or permanent use in connection with the work.

In Article III of the contracts the method for making the various payments referred to therein was set forth. With respect to costs, it was provided that the Government was to currently reimburse the contractors upon certification and verification by the contracting officers of the original papers governing payrolls for labor, invoices for materials, and other expenditures.

Article IV of the contracts required the contractors to keep such books and records as were satisfactory to the contracting officers who had the right to inspect them.

The Standard Oil Company of Louisiana was the lowest competitive bidder in response to bids for gasoline, motor fuel, kerosene, tractor fuel and lubricating oil requested by the respective contractors, in accordance with the instructions of the constructing quartermasters, who

were referred to in the contracts as the Government's contracting officers and who were the Government's representatives at the scene of the construction work. During December 1940 the Standard Oil Company sold gasoline and other petroleum products to the contractors, pursuant to orders placed by them with it, for use and consumption in the performance of the contracts.

The constructing quartermasters were not bound to accept the recommendations of the contractors as to the competitive bids for the petroleum products, but could select other bids or require the contractors to secure additional bids. The bids of the Standard Oil Company on the petroleum products were approved by the constructing quartermasters at each camp. After a supply bid had been approved, the contractors, as the occasion required, prepared purchase orders for the materials needed and submitted them to the constructing quartermasters for approval. After each purchase order had been approved by the constructing quartermasters, the contractors forwarded the original orders to the vendor, the Standard Oil Company of Louisiana. Due to the limited storage facilities at the camps, it was necessary that daily purchases be made of petroleum products and, therefore, it was decided by the contractors and the constructing quartermasters that such purchases should be made verbally. Under this procedure, written purchase orders were prepared each week for deliveries made during the previous week. Later, during the month of December, 1940, written purchase orders were prepared on a monthly basis to cover the purchases made during the previous month. The contractors sent the orders to the constructing quartermasters for approval and after their approval, they were sent to the Standard Oil Company. Under this arrangement, it was necessary for the

Standard Oil Company to grant credit to the contractors for weekly and, subsequently, monthly periods. The orders showed that deliveries were to be made f. o. b. Camp Livingston and Camp Claiborne by the vendor's trucks, the shipments being made to the United States Constructing Quartermasters at Alexandria, La., for account of the respective named contractors. On the reverse side of each purchase order, it was stated that the order was "placed for the benefit of and is assignable to the United States Government, * * *" ~~and that the terms of payment were understood to be effective upon arrival at destination and upon acceptance of material by duly accredited officers of the United States, and upon receipt of properly executed bills of lading and invoices.~~ Upon the delivery of products ordered by the contractors from the suppliers, including the Standard Oil Company, at the site of the respective camps, representatives of the contractors and of the constructing quartermasters simultaneously made separate inspections of the products and prepared separate receiving and inspection reports. After the representatives of both the contractors and the constructing quartermasters had made their reports, the two were compared and if they checked in every detail, the representatives of the constructing quartermasters approved the inspection reports prepared by the representatives of the contractors, and the representatives of the contractors approved the inspection reports prepared by the representatives of the constructing quartermasters. The approval and acceptance in each case was indicated by the signing of the reports.

The vendors' invoices were required to be submitted on forms prescribed by the War Department of the United States and when received by the contractors, the contractors' receiving and inspection reports were attached thereto

and forwarded to the constructing quartermasters. In order to obtain the approval of the constructing quartermasters, the invoices were required to check with the receiving and inspection reports. If the receiving and inspection reports of the contractors and of the constructing quartermasters did not agree in every detail, the constructing quartermasters' reports prevailed. When the amounts or quantities appearing on the constructing quartermasters' reports were less than those shown on the contractors' reports, the vendor was notified by the contractors that a shortage existed in the shipment. Unless the vendor could offer satisfactory proof to the constructing quartermasters that the quantities called for had been actually delivered, reimbursement to the contractors was not authorized by the constructing quartermasters. After the constructing quartermasters had inspected each invoice and found it to be correct in every detail, it was approved and returned to the contractors with Form 116 prescribed by the War Department. The approved invoices, upon being returned to the contractors were then forwarded by them to the Standard Oil Company together with a check, with the request that they be dated, marked "paid" and returned. After the receipted invoices were returned to the contractors, a request for reimbursement on Form 1034 prescribed by the War Department was made out by the contractors and sent to the constructing quartermasters, and after their approval, this form was forwarded to the Finance Officer of the War Department, which had jurisdiction over the particular construction project, and, if approved by him, the contractors were then reimbursed by the War Department for the amount paid to the vendor. In some instances, competitive bids for materials required for the performance of the contracts such as fire proof sheeting, boilers, ranges

and steel, were called for directly by the Quartermaster-General. After acceptance by the Quartermaster-General of one of the bids so received, he informed the constructing quartermasters at the respective camps of such acceptance and the constructing quartermasters directed the contractors to place purchase orders for materials covered in the bids for use in connection with the performance of the contracts relating to the particular camp. On some occasions, the constructing quartermaster directed the contractors to place purchase orders for materials needed solely by the constructing quartermasters in the performance of their administrative duties.

Throughout the contracts, the contractors are called contractors and there is neither any language nor any provision directly or indirectly showing that the contracts are ones of employment, or that the contractors are to be considered as agencies or instrumentalities or departments of the Federal Government. Neither do the Acts of Congress which authorize the War Department to enter into the contracts in any way state or indicate that the contractors are to become agencies, instrumentalities or departments of the United States Government. The contractors were not only required to furnish labor and materials, etc., under the provisions of the contracts, but were also required to furnish broad and extensive insurance protection, which is the usual custom in ordinary construction contracts but not in contracts of employment.

In paragraph 2 of Article I of the contracts it is stipulated that the Government shall pay rental for equipment owned by the contractors and that this shall be additional compensation to the contractors over and above the amount

of their fixed-fees and aside from any reimbursement by the Government to the contractors for the latter's expense.

Paragraph 7 of Article II of the contracts provides that the salaries of the contractors' executive officers and the expenses incurred in conducting the contractors' main or branch offices, etc., shall not in any way be borne by the Government, indicating that the Government did not expect nor require the contractors to give up their private businesses in which they were engaged and to devote their services and time exclusively to the Government.

In paragraph 8 on the same page of the contracts, the contractors were required to take all available and personal cash discounts, allowances, rebates, etc., thus indicating that the contractors and not the Government had entered into contractual relationship with the suppliers and vendors for various articles, materials and supplies to be used in fulfilling the contracts with the Government.

Article V of the contracts is captioned "Special requirements" and under sub-paragraph 1 (b) thereof, the contractors are required to produce all necessary permits and licenses, which an agency or department of the Government would not be required to obtain. For example, public owned motor vehicles are not subject to motor license laws in this State. In that same Article, the contractors are required to make all contracts in their own names and not bind or purport to bind the Government or the contracting officer of the Government thereunder.

The Government did not purchase the petroleum products in question directly from the Standard Oil Company and tax exemption certificates on Form 1094 were

not furnished. The Government's representatives knew that the contractors called for the bids as they were directed to do by them and as a result thereof had entered into the contracts for the purchase of the petroleum products from the Standard Oil Company, which granted extensive credit to the contractors and that the vendor looked solely and only to them for payment and in no way considered that the War Department or the Federal Government was in any way bound to pay the vendor. It also appears in the record that the plaintiff declined to bill or invoice the contractors for supplies sold and delivered to them and to certify that State or local taxes had been excluded.

On the reverse side of the purchase order furnished by the Government and required to be used by the contractors, the following language is printed: "This order is placed for the benefit of, and is assignable to the United States Government. This purchase order does not bind nor purport to bind the United States Government or officers thereunder."

In the second paragraph (d) on the reverse side of the same order there appears: "* * * and that State or local sales taxes are not included in the amounts billed."

The Standard Oil Company refused to execute the certificate, although the taxes in question are neither State nor local sales taxes.

Article II of the contracts provides generally for reimbursement for the contractors' expenditures and subparagraph (m) specifically establishes the Government's liability therefor, as follows:

"Payments from his own fund made by the contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the contractor may be required on account of this contract to pay on or before any plant equipment, process organization, materials, supplies, personnel; and, if approved in writing by the contracting officer in advance, permit and license fees, and royalties on patents used including those owned by the contractor."

In the case of *Six Cos. v. DeVinney*, 2 F. Supp. 693, the plaintiff sought to enjoin the County Assessor from collecting personal property taxes from it on the ground that the property was located within the Federal Reservation and that the plaintiff was an instrumentality of the Federal Government. In dismissing the appeal and holding that the contractor was not an instrumentality of the Government, it was stated:

"* * * The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. * * *"

In the case of *Boeing Airplane Co., et al. v. State Commissioner of Revenue and Taxation, et al.*, 113 Pac. 2nd, 110, the Supreme Court of Kansas had under considera-

tion the contract between an airplane manufacturing company and the Federal Government to enlarge the company's plant facilities and equip them for the exclusive purpose of making airplanes for the Government, which agreed to reimburse the company for cost of such enlargements. The questions of federal agency or instrumentality and immunity from taxation were involved. On the first point, the holding of the Court was set forth, as follows:

"Where an airplane manufacturing company makes a contract with the federal government to enlarge its plant facilities and to equip them for the exclusive purpose of making airplanes for the government, and where the government agrees to reimburse the airplane company for the cost of such enlarged facilities and their equipment in 60 monthly payments upon audited statements thereof, and where after such 60 monthly payments are completed, such facilities and equipment will become the property of the government subject to an option in favor of the airplane company for their acquisition, it is held that the equipment purchased within this state for installation in aforesaid facilities is subject to the two percent sales tax, and where such equipment is purchased outside the state to be installed and used in the enlarged airplane plant facilities it is subject to the compensating use tax; and in neither case are the purchases so made exempt from such taxation on the ground that they are governmental agencies or instrumentalities or on any other theory of constitutional or statutory law."

In *Buckstaff Bath House Co. v. McKinley, et al.*, 60 S. Ct. 279, 308 U. S. 358, the plaintiff corporation operated a bath house on the United States Reservation known as Hot

Springs National Park, under lease from the Secretary of Interior of the United States Government, by the terms of which the operation and use of the bath house facilities, the number of bath tubs used, charges to the public, qualifications of employees, maintenance and care of the premises, prohibition of employment of agents to solicit patronage and the authority over the assignment or transfer of the lease were subject to certain control by the Department of Interior. The Supreme Court of the United States, with Mr. Justice Douglas as its organ, stated that the corporation was engaged in business in its own behalf for profit and that the mere fact it conducted its business under a contract with the Secretary of the Interior did not convert it into an instrumentality of the Government. It was pointed out that although the corporation acted with the Government's permission and had received a privilege from the Government, it did not exercise the privilege on behalf of the Government and that the control reserved by the Government for the protection of a governmental program and the public interest was not incompatible with the retention of the status of a private enterprise. The control which was reserved and exercised did not differ from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality.

In the case of *Federal Compress and Warehouse Company v. McLean*, 54 S. Ct. 267, 291 U. S. 17, 78 L. Ed. 622, the State of Mississippi levied a nondiscriminatory State license tax on the business of operating cotton warehouses and compresses under the provisions of the Federal Warehouse Act. It was held that although the Government exercised control over the business, the license from the Department of Agriculture did not confer upon the

company immunity from State taxation, nor was it converted into an agency or instrumentality of the Federal Government but that in the enjoyment of the privilege it was engaged in its own behalf in the conduct of a private business for profit. It was stated that the enjoyment of such a privilege conferred by either the national or a state government, upon an individual, even though it promotes some governmental policy, does not relieve him from the tax burden under the doctrine of sovereign immunity therefrom.

In the case of *Commissioner of Internal Revenue v. Modjeski*, 75 Fed. (2d) 468, the Court stated that a consulting engineer employed by the Delaware River Joint Commission was an independent contractor and not an agent or instrumentality of the State of Delaware and, therefore, not exempt from the payment of Federal Income Tax.

In *Helvering v. Gerhardt*, 58 S. Ct. 969, 304 U. S. 405, the Court held that the salaries of employees of the New York Port Authority were subject to Federal Income Tax under the theory that the activities of a corporation created as a State agency, which were not essential to the preservation of State government, were not exempt from federal taxation, and rejected the defense based on the doctrine of agency or instrumentality of the State government. The converse of this issue was involved in the case of *Utah Tax Commission v. Van Cott*, 59 S. Ct. 605, 306 U. S. 511.

In *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, the plaintiff had contracts with the United States Government for the construction and maintenance of levees in Louisiana for the control of

the waters of the Mississippi River and sought a reversal of the judgment upholding the State's right to levy and collect excise taxes upon all gasoline or motor fuel sold or used and consumed in the State, on the ground that the contracts were federal improvements or instrumentalities; and that the enactment referred to imposed a direct burden upon them and that the State was, therefore, without power to impose the tax. The Supreme Court held that the contractor was not an agent or instrumentality of the United States but was an independent contractor. See also, *Graves v. People of New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 120 A. L. R. 1466; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172; *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 25 S. Ct. 50; *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 114 A. L. R. 318; *Silas Mason Company v. Tax Commission of Washington*, 302 U. S. 186, 58 S. Ct. 233.

In the case of *Standard Oil V. Lee*, 199 So. 325, the State of Florida sought to impose its gasoline sales tax upon a contractor who entered into an agreement with the Federal Government, through the Naval Department, to construct a naval air station at Jacksonville, on a "cost-plus-basis", which the Attorney-General of this State has assured us was a "cost-plus-a-fixed-fee" contract. The Court concluded that the contractor was not performing any governmental function and was an independent contractor and, therefore, subject to the tax which was not an immediate or direct burden upon the Federal Government, although the Government did pay the tax as a part of the purchase price of the materials.

While the following cited cases do not deal specifically with governmental "cost-plus" contracts, they do show that

the weight of authority is that the status of contractors under similar contracts is one of independence and not agency. See: *Annotations in 2 A. L. R. 126 and 27 A. L. R. 48*; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Whitney Starrette & Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Baumann v. West Allis*, 187 Wis. 506, 204 N. W. 907; *J. D. McCrary Engineering Co. v. White Coal Power Co.*, 35 Fed. 2nd. 142; *Crown City Lodge I. O. O. F. v. Industrial Accident Commission*, 52 Pac. (2d) 143 (Cal. App. *); *Allen v. Republic Building Co.*, 84 S. W. (2d) 506 (Tex. Civ. Ap.)

The foregoing jurisprudence is consistent with that in the field of damage suits where it has been held that under similar contracts an agency was not created thereby.

In *Casement, et al. v. Brown, et al.*, 148 U. S. Rept. 615, the plaintiff sued to recover the value of three barges of coal, lost, as claimed, through the negligence of the defendants. In holding that the defendants were independent contractors, and not employees of the company, and, as such, were liable for damages caused by their own negligence, the Court stated:

"With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. They selected their own servants and employees. Their contract was to produce a specific result. They were to furnish all the ma-

terials and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. * * *

See also: *Krause v. Revelson*, 155 N. E. 137, 115 Ohio 594; *Carleton v. Foundry & Machine Products Co.*, 199 Mich. 148, 165 N. W. 816; *Crown City Lodge I. O. O. F. v. Industrial Accident Com.*, 51 Pac. (2d) 143 (Cal. App.) and *Allen v. Republic Bldg. Co.*, 84 S. W. (2d) 506 (Tex. Civ. App.)

Furthermore, there is nothing in the stipulation of facts that sets forth that any of the corporation or the partnerships contractors here involved, even if they were eligible to qualify as agents or employees of the Federal Government (which is doubtful under the general laws of the United States, 40 U. S. C. A. 270 A, *Helvering v. Powers*, *Walsh-Healey Act* 49 Stat. at L. 2036—Public Act 846—74th Congress, 293 U. S. 214, 55 S. Ct. 171) have complied with any of the formalities required by law or qualified as officers of the Federal Government.

The plaintiff and the intervener assert that the authority for the execution of the contracts are two Acts of the 76th Congress, namely, Public Act 703, approved July 2, 1940, 54 Stat. 712 and Public Act 611, approved June 13, 1940, 54 Stat. 350. It appears that attempts were made to amend proposed legislation to provide for a specific ex-

emption from State taxes for contractors under a "cost-plus-a-fixed-fee" contract, and to legislate them into the status of an agency representing the sovereign nation. It was sought to amend Public Act 43 (53 Stat. at L. 590-92) so as to provide that all contractors who entered into authorized contracts should be held to be agents of the United States for the purpose of such contracts. The Act was passed without the proposed amendment. Prior to the passage of Public Act 588 of the 76th Congress, the language therein, which would have made such contractors agents of the government and would have exempted them from all taxes—federal, state and local, it was stricken therefrom in the House and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-35, Amd't. 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, page 7646-48. Therefore, when the War Department entered into the contracts in question, it was with full knowledge that Congress had refused to make such contractors agents or instrumentalities of the Government and that Congress had likewise refused to make available to such contractors a specific statutory exemption from State and local taxes. The clauses and stipulations in the "cost-plus-a-fixed-fee" contracts in question, giving the Government greater control and supervision of the contractors than is usually found in contracts with independent contractors on a "lump sum" basis, are therefore shown to have been placed in the contracts by the Government for its protection against imposition or overcharge and not for the purpose of making these contractors agencies, instrumentalities or departments of the United States Government.

The question of whether or not a contractor under the law is an independent one or an agent depends upon the intention of the parties as expressed in the contract. The

Contractor is the one who is the lowest lump-sum basis. He depends for his profit or loss on the difference between the amount that the materials, labor, etc., cost him and the amount of the contract price. The independent contractor on a "cost-plus-a-percentage-of-cost" basis is one who undertakes the construction required by the contract and the owner reimburses him for the costs of materials, labor, etc., and the contractor's profit or gain is to be a certain percentage of the total cost of the project. These types of contractors are legally classified as independent contractors. The third or new type of contract is called a "cost-plus-a-fixed-fee" contract, which means that the contractor is to be reimbursed for the costs of materials, labor, etc. by the owner and is to receive a fixed fee as his profit or gain. This fee, which is fixed as his profit or gain for the performance of the contract, is identical with the profit or gain which the contractor on a "cost-plus-a-percentage-of-the-cost" contract receives in respect that neither contractor takes any chance of losing. The profit or gain on a "cost-plus-a-fixed-fee" contract is dissimilar from the profit or gain on a "cost-plus-a-percentage-of-the-cost" contract only in the respect that the amount is not exactly determined in advance. The only difference between the "cost-plus-a-fixed-fee" and the "cost-plus-a-percentage-of-the-cost" contract on the one hand, and a "lump sum" contract on the other, is that in the two former cases, the contractor's profit or gain is assured, whereas, on a "lump-sum" contract, it is possible that the anticipated and expected profit may turn into a loss because of a low bid or advances in the prices of materials or the cost of labor. In all three types of contracts, however, the contractor is certainly an independent contractor, if the provisions of the contract make him so and do not in any way indicate or state that

the parties intended that it was a contract of employment or agency or that the contractor was an instrumentality of the Government. In all of the above cases, the contractor operates his business for his own profit and gain. He is not performing governmental functions and has no authority to, in anyway, bind the owner or Government either for the purchase of the materials or for the hiring of labor.

In the instant case, we have shown that it was not the intention of the parties to name or designate the contractors as agencies, instrumentalities or departments of the United States Government. The Debates in the House of Representatives conclusively show that Congress withheld such status from these types of contractors, as reference to the Congressional Records will reveal. Cong. Rec., Vol. 86, Part. 7, pages 7532-35, in the Debates of June 4, 1940. Since Congress did not make such contractors agencies of the Federal Government, then clearly the War Department, as the representative of the Government, in carrying the legislation into practical effect, did not intend to do so in making the contracts with them.

A fundamental rule of statutory construction is that statutes granting tax exemptions are to be strictly construed because they grant an exceptional privilege, and the right to enjoy the exemption must be clearly, unequivocally and affirmatively established. *Hibernia National Bank, et al. v. Louisiana Tax Commission*, 195 La. 43, 196 So. 15; *Pearce, et al. v. Couvillion*, 164 La. 155, 113 So. 801; and *Louisiana and N. W. R. co. v. State Board of Appraisers*, 108 La. 14, 32 So. 184.

The exemption from the State taxes in question by the United States Government was expressly and clearly

granted when the sales were made to the United States Government, or any agency of the Government, or any department of the Government. The statute does not grant the exemption in favor of the United States Government where the sales are made to a contractor who entered into a contract with the United States Government to perform work, unless the contract or the authority under which the contract was entered into shows clearly, positively and definitely that the contractor was designated, and enjoyed the status of, an agency, instrumentality, or department of the Government. The agencies, instrumentalities and departments of the Government necessarily perform governmental functions. The contractors in this case were not employed to give their full service, time and effort to the performance of the work, but undertook to build and erect the camps and improvements required by the plans and specifications furnished by the Government. The contract did not bind or require them to perform any governmental functions or operations and they entered into the contracts for profit and gain, represented by a fee predicated upon the amount of work and responsibility involved. We do not think that, even by a liberal construction of the State statute, the facts of this case bring the taxes in question within the statutory exemption, because it is most difficult to imagine an agency or department of the United States Government without any capacity, ability or right to in any way bind the Federal Government, as the agreed statement of facts shows that the contractors in the instant case were incapable of doing.

The attorneys for the Government and the Standard Oil Company have tried to limit a consideration of the issue to the facts dealing strictly with the purchase of the petroleum products. The defendant, Director of Revenue, has

taken in the full scope of the contracts to show the true legal status of the contractors. The best that can be said for the plaintiff's and the intervenor's contention is that the contractors in the instant case, since the work was done on a "cost-plus-a-fixed-fee" basis, were under very strict supervision, direction and control in order that the Government could protect itself against unnecessary and excessive expenditures of money for materials and labor to be used by the contractors in connection with the performance of the contracts. These circumstances are certainly insufficient to show that the contractors were mere purchasing agents of the War Department of the Government. On the contrary, the defendant has shown that the contractors were obligated to furnish both materials and labor for the performance of the work and that the materials purchased by the contractors were to be paid for by them to the vendors and suppliers and that the Government, upon inspection and approval thereof, would reimburse the contractors for the cost of them. The vendors had no contractual relations whatsoever with the Government and the Government was not in any way liable to them, but was solely and only liable to the contractors for reimbursement for materials accepted by its representatives. The fact that the Government had the right to have the contracts for purchases of the materials by the contractors from the vendors assigned to its negatives any idea that the contractors were the agents of the Government, because, if the contractors were agents or representatives of the Government, an assignment of the contracts and orders for purchases from the suppliers would have been unnecessary. The United States Government unquestionably had the right through any of its agencies or departments to purchase materials and supplies and thus be entitled to the statutory exemption, but the Government elected not to do

so. It entered into contracts with the partnerships and the corporation engaged in business for profit for the purpose of erecting the improvements desired at the camps and, having failed to name the contractors as agents or to establish them as departments of the Government, it appears to us that the United States Government, acting under Congressional Acts, through the War Department, represented by the Quartermaster-General, has proceeded in a way so as not to take advantage of these exemptions, apparently as a matter of policy, realizing that there would be a serious disturbance and impairment of the fisc of the State, aside from the fact that great risks would result from such contractors having the power and authority as agents or departments to bind and obligate the Federal Government.

Considering the facts herein and the above referred to jurisprudence, it is our opinion that the contractors were not agents, instrumentalities or departments of the United States Government within the meaning of the Louisiana statutory exemptions.

The Standard Oil Company has relied on the cases of *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 48 S. Ct. 451, *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, *Case-ment v. Brown*, 148 U. S. 615, 13 S. Ct. 672, and *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 S. Ct. 601. These cases are to be distinguished from the instant one because the Court found, for instance, in the *Panhandle Oil Company v. Mississippi* and the *Graves v. Texas Co.* cases that the sales were directly to the United States Government. Furthermore, the cases have been distinguished and must be deemed limited to their specific facts, which were not the same as the facts established in this case.

In the case of *King & Boozer v. State*, 3 So. (2d) 572, also cited by the plaintiff and the intervener, the Supreme Court of Alabama, by a divided Court, held, in annulling the judgment of the Circuit Court, that the contractor under a "cost-plus-a-fixed-fee" contract was the agent for the Government in purchasing the lumber in question and, therefore, the sale was direct to the United States for its exclusive use and benefit and not for the contractors and, therefore, the sales tax was a direct and immediate tax burden on the Federal Government and its instrumentalities. This case was followed by the same Court in *United States v. Curry*, 3 So. (2d) 582. We are informed by counsel that the Attorney-General of the United States has joined in an application asking the Supreme Court of the United States to review the cases on writs of certiorari. It is our opinion that the provisions of the contract in that case, which appear to be identical with those in the instant case, are inconsistent with any conclusion that the contractor was the agent or instrumentality of the Federal Government, purchasing directly for the Government the lumber in question. The contractor there, as here, was purchasing the materials for his own account for the purpose of fulfilling the contract and until the Government accepted the materials from him, he was the owner thereof and he was solely and only responsible and liable to pay the furnisher of the materials. Furthermore, in our opinion, the conclusions reached in these cases, are not in accord with the above outlined jurisprudence but are in keeping with the cases which we have pointed out have been restricted to their own facts or impliedly overruled.

Although the intervener, the United States, neither pleaded nor claimed the implied constitutional immunity against the taxes as a direct and immediate burden upon

governmental operations of the United States, the plaintiff, the Standard Oil Company, raised and pressed this issue. Since the United States has elected not to urge constitutional immunity against the taxes, it is clear that the Standard Oil Company, a Louisiana corporation and a dealer in petroleum products within the meaning of the taxing statute, does not have the right to do so, because the immunity is peculiar to the United States on account of its status as a Sovereign Nation. The Standard Oil Company, of course, enjoys no such position. The implied constitutional immunity in favor of the Federal Government against State taxes which are a direct and immediate burden upon governmental operations is a right which the United States has in no way even attempted to directly or indirectly authorize the Standard Oil Company to assert, if such authorization were permissible. It must also be borne in mind that the contractors to whom the plaintiff sold the petroleum products are not before the Court and that the Standard Oil Company does not even pretend that the United States Government is liable for the purchase price of the products sold to the contractors, or that it had any contractual relations whatever with the United States Government.

In the case of *Rome v. London & Lancashire Indemnity Company*, 160 So. 132 (*writ refused*), 181 La. 630, 160 So. 121, 157 So. 175, 156 So. 64, this Court held that the immunity of the State government or any of its subdivisions against liability for tort arising out of the negligence of its representatives or employees while engaged in governmental functions was confined to them and could not be pleaded as a defense by the insurance liability carrier of the governmental subdivision.

In the case of *Edwards v. Royal Indemnity Company*, 182 La. 171, 161 So. 191, we held that the plea of coverture available to the husband to defeat recovery by his wife for injuries resulting from his negligent operation of an automobile, before their marriage, was a personal defense which was not available to the husband's liability insurer in an action brought by the wife directly against the insurer. This immunity from liability for such a suit resulted under our law from the status of the parties as husband and wife during the marriage.

The foregoing authorities are adverse to plaintiff's position and are decisive of the issue that it does not have the right to plead constitutional governmental immunity against the taxes. However, since an important federal question is involved and the defendant has not interposed any objection to the plaintiff raising this issue and has squarely met the allegations of the petition that the taxes are a direct and immediate burden on governmental operation by denying them and asserting that the taxes are remote and consequential and that the contractors were not agencies or instrumentalities of the United States Government but were independent contractors, we shall consider this point. It must be remembered that the contractual relationship was solely between the contractors and the Standard Oil Company for the purchase of the petroleum products and that the contractors purchased these products for their own account to perform their contracts and were solely and only liable to the vendor for their purchase price. As between the vendor and the contractors upon their acceptance of the petroleum products, title passed to each of them respectively and upon acceptance and approval by the constructing quartermasters, the title then vested in the Federal Government with the obligation to reimburse the

contractors for the full purchase price thereof, including all applicable State and local taxes. The statutes expressly lay the tax burden on the Standard Oil Company as a dealer in petroleum products and does not place any liability whatsoever upon the contractors, as purchasers thereof, for the taxes. There is no doubt that the vendor added the taxes into the purchase prices which were paid for the petroleum products.

In the case of *Railroad Company v. Peniston*, 18 Wall. 5, the United States Supreme Court said:

"All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, * * *

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. * * *

In the case of *Baltimore Ship Building & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 25 S. Ct. 50, the Court said:

"* * * it seems to us extravagant to say that an independent private corporation for gain is created by a state, exempt from state taxation; either in its corporate business or its property, be-

cause it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, the plaintiff sought to avoid the payment of the tax due on gasoline sold and used by it in performing its contracts with the United States Government to construct levees. The implied constitutional immunity doctrine was invoked. The Court, after concluding that the contractor was an independent one, held:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River and to authorize the performance of the work directly by the government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. * * * Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of

appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. * * * Appellant's claim of immunity is without foundation."

It will be noted in that case that the contractor itself was before the Court pleading its governmental agency and instrumentality with the resulting tax immunity, which was denied by the Court, whereas, in the instant case, neither the contractors themselves nor the Government is before us urging that point.

In *Standard Oil Company v. Lee*, 199 So. 325, (Fla.) which involved a contract on a "cost-plus-basis" (a "cost-plus-a-fixed-fee" contract), the Court said:

"The test of validity of the tax in these cases is not whether it is laid directly on the United States or one of its governmental agencies but whether or not in the way laid, it directly retards, impedes, or burdens the United States in the exercise of its constitutional powers. It cannot be questioned that the tax here falls ultimately on the federal government. The contractors are agencies of the latter, executing a contract for profit; they do not perform any governmental functions. The burden of the federal government is consequential and remote. It increases the cost to the government but when accomplished in this manner, the federal cases appear to sanction the contract. * * *

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, the Court upheld a percentage tax on the contractor's gross receipts from a contract with the United

States. The contract provided for partial payments as the work progressed and that all the materials covered by the partial payments should “* * * thereupon become the sole property of the Government.” The West Virginia statute was held inapplicable to the gross receipts resulting from business in the State of Pennsylvania and outside of the State of West Virginia, but applicable and valid as to the portion derived from its activities within the State. The Court said:

“* * * The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of the government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

* * * * *

“* * * Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States. ‘Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.’ *Thomson v. Union P. R. Co.*, 9 Wall. 579, 591, 19 L. ed. 792, 798.

* * * * *

“But if it be assumed that the gross receipts tax may increase the cost to the government that fact would not invalidate the tax. With respect to that effect, a tax on the contractor’s gross re-

ceipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery, but on the fuel used to operate it. * * * But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the government. The fact that the tax on the gross receipts of the contractor in the *Alward Case*, *supra*, might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity."

In *Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273 it was held that a nondiscriminatory license tax upon an automotive transportation company was not prohibitive in an instance where the United States mails were transported.

In *Silas Mason Co. Inc. et al. v. Tax Commission of the State of Washington*, 302 U. S. 186, 58 S. Ct. 233, it was held that there was no unconstitutional burden upon the Federal Government in the imposition of the occupational license tax levied by the State of Washington when applied to the gross income of contractors on the construction and excavation in completing the Grand Coulee Dam and power plant. See also: *Boeing Airplane Co. v. State Commission of Revenue*, 113 Pac. 110, *supra*.

The excise or dealers' taxes in the instant case are not laid and do not fall either upon the contractors or the

United States Government but upon the Standard Oil Company and, therefore, are only remote and consequential in their effect upon the Federal Government.

Is it our opinion that the contractors under the "cost-plus-a-fixed fee" contracts in this case are independent contractors; that the petroleum products were sold to them by the Standard Oil Company as such and not as agents, employees, representatives or instrumentalities of the United States Government; that the taxes in question did not immediately and directly burden the Federal Government's operation; that, if the taxes affected the Government at all, it was consequential and remote, in that the tax burden was placed directly and solely and only upon the Standard Oil Company as a dealer; and that, if the taxes or any part thereof were passed on as a part of the purchase price to the contractors and they, in turn, passed them on to the Government as a part of the cost for reimbursement, under the decisions of the Supreme Court of the United States this is not a violation of the implied constitutional immunity of the Sovereign Government of the United States against State and local taxes.

The Standard Oil Company, in the alternative, pleaded that the sales by it to the contractors were wholesale sales which were followed by retail sales by the contractors to the Federal Government and, therefore, the taxes were not due. The Government did not join in raising this issue, apparently realizing that it was inconsistent with its position that the sales were directly to the United States Government, its agencies, or representatives. The trial court did not pass upon this point. There is no doubt that under the contracts and the law that title to the petroleum prod-

ucts passed from the Standard Oil Company to the contractors when they purchased and accepted delivery of these products and that the title passed from the contractors to the United States Government when its representatives checked and accepted them and ordered the contractors reimbursed therefor. This, of course, is consistent with the defendant's position that the contractors were independent contractors and that the taxes were not a direct and immediate burden upon federal government operations but consequential and remote. The alternative plea of the plaintiff avails it nothing because under the provisions of the statutes and the jurisprudence, wholesale as well as retail sales are covered by the statutes and the dealer is made liable for the taxes. *State v. Sinclair Refining Co.*, 195 La. 288, 196 So. 349.

The issues raised by the plaintiff, the Standard Oil Company, and the intervener, the United States Government, that as to the levy of the State taxes on products delivered in the State areas which are owned in fee-simple by the United States Government or leased by it—the sites where the camps are located—the tax laws in question are void and of no effect under Article 1, Section 8, Clause 17 and Article 6, Section 1 of the 14th Amendment of the Constitution of the United States, have been abandoned by them.

The conclusion which we have reached in favor of the State Collector of Revenue, formerly the Director of Revenue—that the taxes in question were validly levied and collected from the Standard Oil Company, as a dealer, makes it unnecessary for us to consider the State's contention whether the attempt to extend the mantle of govern-

mental immunity from State and local taxation to private businesses simply because of contractual relations with the United States Government, is unconstitutional and in violation of the reserved rights of the State of Louisiana and an invalid invasion of the reserved constitutional powers of the Sovereign State of Louisiana to levy and collect nondiscriminatory taxes.

For the reasons assigned, the judgment appealed from is annulled, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant, Rufus W. Fontenot, Collector of Revenue of the State of Louisiana, formerly the Director of Revenue of the State of Louisiana, and against the plaintiff, the Standard Oil Company of Louisiana, and the intervener, the United States Government, rejecting their demands.

CONCLUSION

We submit that on the question of agency, the decision of the Louisiana Supreme Court, following, as it does, the decisions of the Supreme Court of Florida in *Standard Oil Company v. Lee*, 199 So. 325, and the Supreme Court of Kansas in *Boeing Airplane Company, et al v. State Commissioner, etc.*, 113 Pac. 2nd. 110, is clearly indicative of the error into which the Supreme Court of Alabama fell in the case at bar. Mr. Justice Higgins' analysis of the true relationship of the parties, as set out in the opinion above quoted, is peculiarly applicable to the facts in the case at bar, and clearly indicates the errors into which the Supreme Court of Alabama has fallen. The proper conclusion is that reached by the Supreme Court of Louisiana, and that is, that a contractor in a "cost-plus-a-fixed-fee"

contract is independent, and is neither an agent nor an instrumentality of the United States.

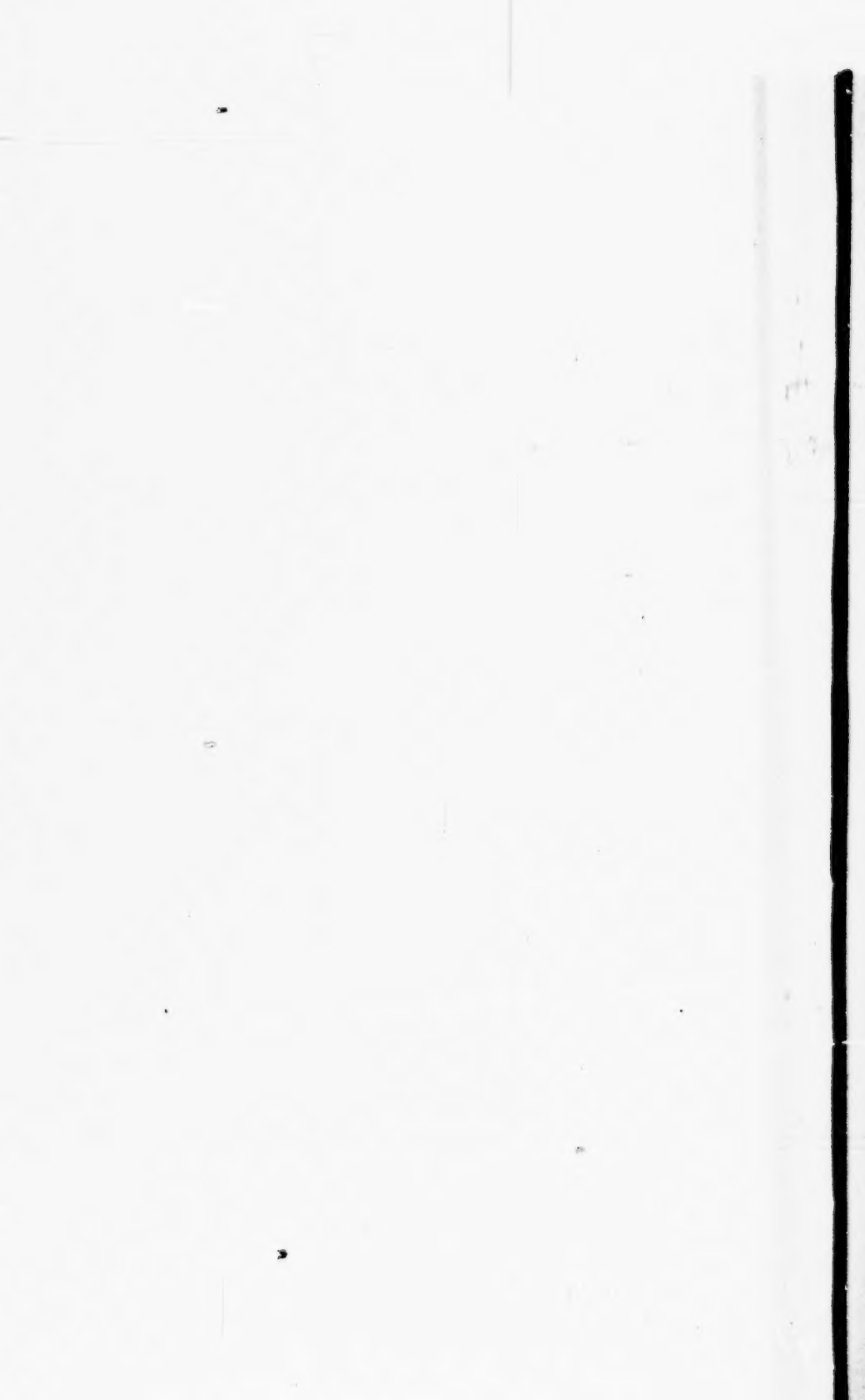
Respectfully submitted,

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AMICI CURIAE.





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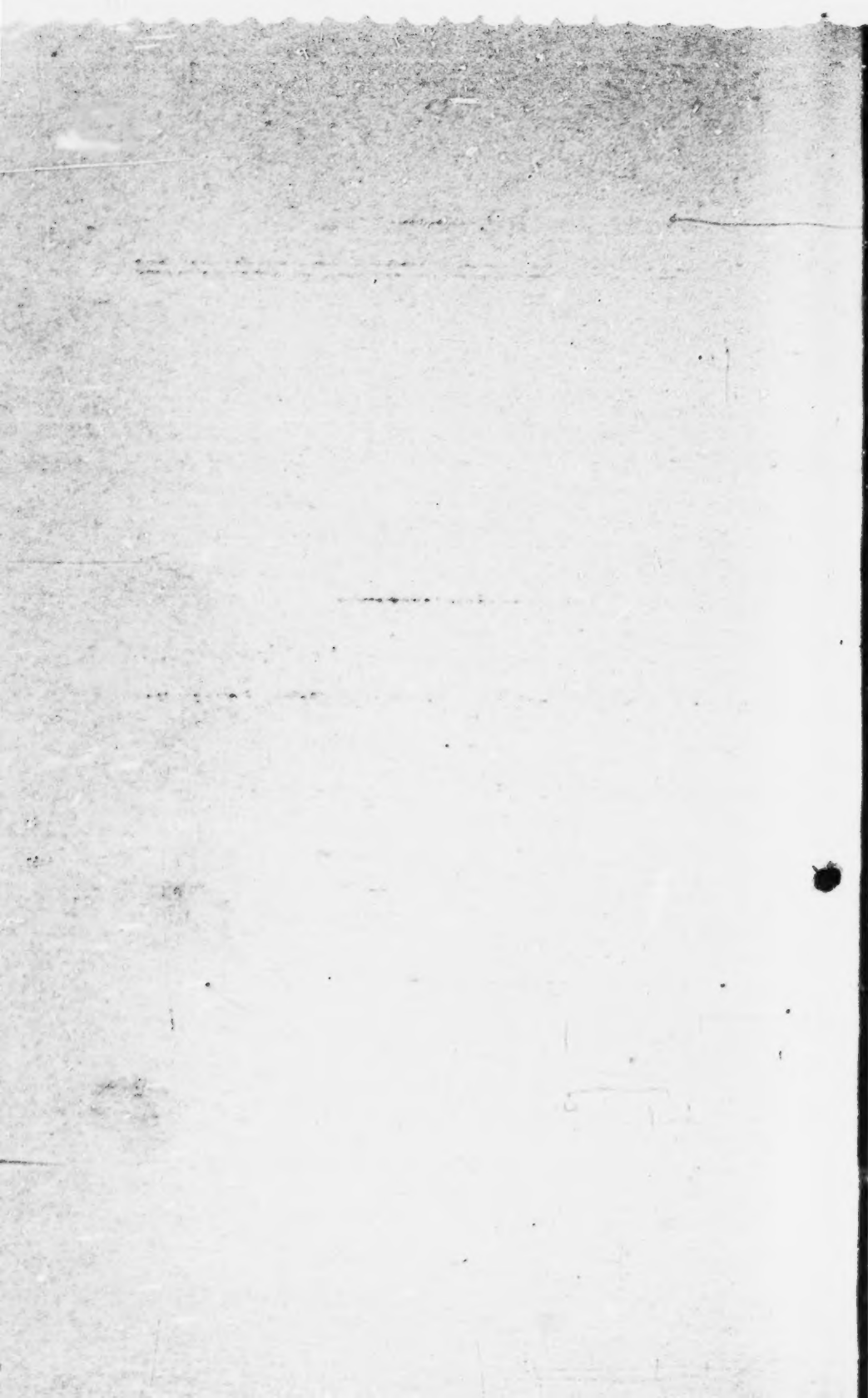
OCTOBER TERM, 1941

JOHN C. CURRY, individually and as Commissioner of Revenue of the State of Alabama, Petitioner

vs.

UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON AND COMPANY, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA**



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**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

NO. ———

**JOHN C. CURRY, individually and as Commissioner
of Revenue of the State of Alabama, Petitioner**

vs.

**UNITED STATES OF AMERICA, DUNN CON-
STRUCTION COMPANY, INC., and JOHN S.
HODGSON AND COMPANY, partners doing
business as Dunn Construction Company, Inc.,
and John S. Hodgson and Company.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA**

John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, prays that a writ of certiorari issue to review the final decree of the Supreme Court of Alabama rendered in the above case on July 29, 1941 (R. folio 134, 135), reversing and rendering the decree of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 123, 124).

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 123, 124), is not reported.

The opinion of the Supreme Court of Alabama (R. folio 136-138) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 582.

JURISDICTIONAL STATEMENT

This is a companion case to that of *State of Alabama, Petitioner vs. King and Boozer, and United States of America*, Supreme Court of the United States, October Term. 1941, No., both cases having been argued and decided as companion cases in the Court below.

The final decree of the Supreme Court of Alabama sought to be reviewed was entered on July 29, 1941, (R. folio 134, 135). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

The issue in this case is whether the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company are taxable under the provisions of the Alabama Use Tax Act (General Acts of Alabama, 1939, p. 96) with respect to the storage,

use or other consumption of tangible personal property by such respondents, as contractors under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States. The sustaining of the claim for such immunity by the Court below plainly presents a Federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank v. Priddy*, 295 U. S. 229; *Pittman v. Home Owners' Corporation*, 308 U. S. 21; *The Federal Land Bank of St. Paul v. Bismarck Lumber Company*, No. 1035, October Term 1940.

The claim by the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, of immunity from the application of the Alabama Use Tax Act under the Constitution of the United States was specially set up in the protest of payment of the tax (R. folio 49, 50); this claim was further set up by all the respondents in their bill for a declaratory judgment in the Circuit Court of Montgomery County, Alabama, in Equity (R. folio 5-7); in the amended bill (R. folio 43-45); in the assignments of error by all the respondents, appellants in the Court below (R. folio 129, 130); and was briefed and argued in the Court below.

The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Use Tax Act with respect to the storage,

use, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session and Special Session, 1939, p. 96), and of the Acts of Congress (Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343, the Act of July 2, 1940 Public No. 703, 76th Cong., 3d Sess., c. 508, and the Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787), are printed in the Appendix, *infra*.

STATEMENT

This petition is filed to review a final decree of the Supreme Court of Alabama rendered on July 29, 1941, which held invalid an assessment of use taxes made by the State of Alabama under the provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session, 1939, page 96) against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, contractors, with respect to the storage, use, or other consumption of tangible personal property

purchased and stored, used, or consumed by said contractors under and pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama.

The Supreme Court of Alabama, upon the authority of the decision in the companion case in that Court, *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, held that the storage, use, or other consumption was immune from State taxation under the Constitution of the United States. In the majority opinion of the Court below it was further held that the contractors were instrumentalities of the United States; and that the United States had not consented to the tax or to the payment thereof by the contractors as a part of the cost of the construction (R. folio 136). A dissenting opinion was rendered by one of the Justices (R. folio 137, 138).

The "Cost-Plus-a-Fixed-Fee Construction Contract" was executed on September 9, 1940, under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public, No. 611, 76th Cong., 3d Sess., c. 343, and the Act of July 2, 1940, Public, No. 703, 76th Cong., 3d Sess., c. 508. (Appendix, pp-.....)

The purchases of all the property and the storage, use, or consumption thereof involved in said assessment took place in substantially the same manner as particularly stipulated with respect to certain roofing material purchased by the contractors from the Certainteed Products Company of Atlanta, Georgia

(R. folio 65, 66). The contractors submitted the purchase order to Certaineed Products Corporation of Atlanta, Georgia, and the materials therein ordered were shipped by such vendor by freight from Atlanta, Georgia, to "United States Construction Quartermaster, at Fort McClellan, Alabama, Account of Dunn Construction Company, Inc., and John S. Hodgson & Company." Such materials, upon arrival at destination, were unloaded, and after being inspected by representatives of the contractors and the United States, were placed in a general warehouse located within said Fort McClellan, which warehouse belonged to the United States, and was used for the storage of materials purchased in connection with the performance of said contract. Such materials were thereafter withdrawn and used by contractors as and when needed by them in the performance of said construction contract (R. folio 66, 67).

After delivery of the goods to the respondent contractors and the payment therefor by the contractors with their own funds (R. folio 67), they received reimbursement therefor from the United States (R. folio 68). The invoice rendered the contractors did not include the Alabama sales or use tax (R. folio 74); and no such tax was paid to the State of Alabama by either the vendor or the contractors prior to the making of said assessment. (R. folio 68).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all

things necessary for the completion of the following work: Construction of a complete tent camp * * * * * at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and subject in every detail to his supervision, direction, and instructions" (R. folio 15); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 16)

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHTY DOLLARS (\$3,204,588.00), as stated in Article I (R. folio 15).

Article II of the contract, among other things, provided as follows:

"Cost of the work.

"REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

"1 The Contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer and as are included in the following items:

"(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use for the benefit of the work. All articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government." (R. folio 17)

"(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor." (R. folio 19)

Other expenditures itemized in Article II are not involved in the case.

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3 The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. folio 16)

Article V of the contract under the head of "Special Requirements" contained, among other provisions, the following:

"1. The contractor hereby agrees that he will:"

"(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United State of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c) Unless this provision is waived in writing by the contracting officer, reduce to writing

every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases without the prior approval of the Contracting Officer." (R. folio 24)

The purchase orders, as shown by copy of a typical purchase order (R. folio 71), after approval by the Constructing Quartermaster, were given by the contractors to the vendors. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTING QUARTERMASTER At Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. folio 71)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. folio 72)

The following, among other instructions, were endorsed on each purchase order :

"2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala.:

"A. Original and two (2) copies of Bill of Lading, or shipping papers.

"Bills of Lading, etc., must read

United States Construction Quartermaster
at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company and must also bear Purchase Order Number.

"B. Six (6) copies of invoice, properly filled and certified as follows:

"I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished

under this invoice have been mined or produced in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. folio 72)

The record showed that in placing orders for materials, shipping and making delivery thereof, and in obtaining reimbursement therefor, the contractors were required to comply with various detailed rules, regulations or instructions of the United States or the Contracting Officer or his agent, the Constructing Quartermaster, but for the purpose of this petition, it is not deemed necessary to set forth in more detail the facts relating to such circumstances and incidents. (R. folio 80-121)

Under the provisions of Section IX of the Alabama Use Tax Act, the assessment was made on May 8, 1941, against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of Forty-six and 26/100 Dollars (\$46.26), being an amount equal to two per cent (2%) of the sales price of such property, together with the sum of Four and 63/100 Dollars (\$4.63) as penalty, and the sum of 23/100 Dollars (\$.23) interest, amounting in the aggregate to the sum of Fifty-one and 12/100 Dollars (\$51.12) (R. folio 47, 48).

The respondent contractors on the same day paid to the State Department of Revenue, under protest, the amount of said assessment. (R. folio 48-51).

Under the provisions of Section XXIV of such Act, the respondent contractors, together with the United States of America, filed a petition in the Circuit Court of Montgomery County, Alabama, in Equity, against John C. Curry, as Commissioner of Revenue, praying for a declaratory judgment to determine the liability of the respondent contractors for the amount so paid or their rights to a refund thereof (R. folio 2-40; amended petition R. folio 40-46).

The trial Court upheld the validity of the assessment (R. folio 123, 124), from which an appeal was taken by the respondents to the Supreme Court of Alabama (R. folio 124, 125).

In the trial of the cause in the Circuit Court and on appeal in the Supreme Court, the respondents contended that the "storage, use, or other consumption of the tangible personal property which is the subject of the tax in controversy were the storage, use, or other consumption by the United States or by an agency or instrumentality of the United States on behalf of the United States, and are constitutionally immune from taxation by the State of Alabama," and that the United States had not consented to the imposition of the tax in controversy.

The petitioner contended that the tax as imposed upon the respondent contractors was valid; that the

storage, use, or other consumption which was the basis of the tax was a storage, use, or other consumption by the respondent contractors, a private corporation and partnership composed of individuals, both engaged in business for private profit, who were not acting as instrumentalities of the United States; that the imposition of the tax upon the contractors did not constitute an undue burden upon the United States; that the United States waived any immunity with respect to such tax in that: by the terms of the contract the United States consented to the payment by said contractors of such taxes, and provided for the reimbursement thereof, as a part of the cost of such construction.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting; and on the authority of the decision in the companion case in such Court of *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, reversed the decree of the trial Court and rendered a final decree in favor of the respondents and against the petitioner (R. folio 136-138).

This case was presented to the Supreme Court of Alabama as a companion case to *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, decided on the same date, involving the validity of an assessment of sales taxes made under the Alabama Sales Tax Act (General Acts of Alabama, Regular Session, 1939, p. 16) with respect to materials sold to the respondent contractors, and in which companion case a like petition for writ of certiorari is being filed with this Court.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama based its decision on the authority of the companion case in that Court of *King and Boozer v. State of Alabama*, 3 So. (2d) 572, on the ground that the questions presented for decision in this case were substantially the same as those discussed and decided in the *King and Boozer* case (R. folio 136). Therefore, the opinion of the Court in the *King and Boozer* case must be examined to determine the reasons for the Court's decision in the case at bar.

The writ should be granted for the following separate and several reasons:

1. The decision of the Court below that the use, storage, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is immune under the Constitution of the United States from nondiscriminatory use taxes imposed by the State, for the reason that the State is prohibited by the Constitution of the United States from imposing "any tax upon the transactions by which the United States secures the things desired for its governmental purposes," was based upon the cases of *Panhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U. S. 218, and *Graves v. Texas Co.*, 298 U. S. 393. These cases have been distinguished and expressly

limited to a tax upon direct sales to the United States or an instrumentality thereof. *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383; *Wheeler Lumber Bridge and Supply Co. v. United States*, 281 U. S. 572; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. Tax Commission*, 302 U. S. 186; *Trinityfarms Construction Co. v. Grosjean*, 291 U. S. 466. The Court below clearly erred in applying the holding of the *Panhandle* and *Graves* cases to the storage, use, or consumption of materials purchased by a contractor.

2. The power of the State to impose a nondiscriminatory use tax upon a contractor storing, using, or otherwise consuming materials purchased by him pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States is not dependent upon consent of Congress.* However, such form of contract, and particularly the tax provision therein (Article II (m)), was considered by Congress on June 4, 1940 (Congressional Record, 76th Congress, 3d Session, Volume 86, Part 7, pp. 7518, 7527-7539), when it rejected proposals to change such provision or the status of the contractors in purchasing materials under such contract; and, thereafter, in the Act of July 2, 1940 (Public No. 703), under which the construction of Fort McClellan, Alabama, was authorized, Congress expressly authorized the Secretary of War to use "the cost-plus-a-fixed-fee form of contract" (Section 1, Public, No. 703, Appendix,

*Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787, (Appendix, *infra*), effective after December 31, 1940, permitted imposition of State sales and use taxes in any Federal area.

infra). Notwithstanding such express approval of the form of contract and the delegation of authority to the Secretary of War to execute the same, as we read the decision, the Court held there was no congressional consent to the imposition of the tax, or to the payment thereof as a part of the "Cost of the Work" (Article II (m)); and that if the provision in Article II (m) of the contract was intended as a waiver of any tax immunity, the officer executing the contract (the Secretary of War) lacked the power or authority to do so; and, as interpreted by the Court, the provision was rendered meaningless. This was clearly erroneous.

3. Although the Court failed to designate the status of the contractors, it, in effect, construed them to be instrumentalities of the United States, entitled to constitutional immunity from State taxation. As the contractors were operating for private profit, the decision on this point was clearly erroneous. *Baltimore Ship Bldg. & Dry Dock v. Baltimore*, 195 U. S. 375; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Standard Oil Company v. Lee*, 199 So. 325; *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319; *Brooklyn Ash Removal Co., Inc. v. United States*, 80 Ct. Cls. 770, cert. den., 295 U. S. 752; *Helvering v. Cluiboarne-Annapolis Ferry Co.*, 93 Fed. (2d) 875.

4. The decision of the Court below is directly in conflict with the decision of the Supreme Court of Florida, the highest Court of such State, in the case of *Standard Oil Company v. Lee*, 199 So. 325, where

the same form of contract and the same Federal questions were involved. Such conflict has been held to constitute a ground for granting a writ of certiorari. *Pagel v. MacLean*, 283 U. S. 266; *Singleton v. Cheek*, 284 U. S. 493; *Spicer v. Smith*, 288 U. S. 430; *Trotter v. State of Tennessee*, 290 U. S. 354; *Pagel v. Pagel*, 291 U. S. 473; *Connell v. Walker*, 291 U. S. 1; *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U. S. 57.

5. The decision of the Court below involves the construction of a form of contract expressly authorized by Congress for general use in connection with the National Defense Program involving the expenditure of billions of dollars. A decision by this Court is necessary to settle conflicting interpretations by the Courts and administrative authorities of such form of contract, to determine the Constitutional questions involved as affecting the taxing power of the States, the immunity of the Federal Government, and the doctrine of intergovernmental tax immunity.

CONCLUSION

The decision sought to be reviewed involves questions of vital concern to the Federal Government and the several States. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

THOMAS S. LAWSON,
Attorney General of Alabama.

JOHN W. LAPSLEY,
Assistant Attorney General.

J. EDWARD THORNTON,
Assistant Attorney General.

GARDNER F. GOODWYN, JR.,
of Counsel.

APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

Section 1. DEFINITIONS. The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this Section, except where the context indicates a different meaning: (a) The term "person" or the term "company" herein used interchangeably, includes any individual, firm, company, partnership, association, corporation, receiver or trustee, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b) The term "Department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the tangible personal property or products which he manufactures

or compounds for sale, and the furnished container and label thereof. (e) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (f) The word "business" as used in this act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls. (g) The term "storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail. (h) The term "use" means and includes

the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business. (i) The term "purchase" means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been effected; and whether such consideration be a price or rental in money, or by way of exchange or barter. (j) The term "sales price" means the total amount for which tangible property is sold, including any services (including transportation) that are a part of the sale, valued in money, whether paid in money or otherwise, and includes ~~the~~ amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included and sales price shall not include the amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or by credit. (k) The term "in this state" or "in the state" means within the exterior limits of the State of Alabama,

and includes all territory within such limits owned by or ceded to the United States of America.

Section II. (a) An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. (b) An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) of the sales price of such automotive vehicle. Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to the State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the Department, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accord-

ance with the provisions of Section V. hereof, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

Section III. EXEMPTIONS. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the provisions of House Bill 179 approved February 23, 1937 and known as the Alabama Luxury Tax Act or by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. ***** (d) Property stored, used or consumed by the State of Alabama, by the counties within the State, or by incorporated municipalities of the State of Alabama. *****

Section IV. Every seller of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state, shall within thirty days after the effective date of

this act, register with the Department and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Department may require with respect to matters pertinent to the enforcement of this act; Provided, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of House Bill 82 approved February 8, 1939 and any amendments thereto, to register with the Department as provided in this act.

Section V. Every such seller making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section III. hereof, shall at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time of such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Department. The tax required to be collected by the seller from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales. It shall be unlawful for any such seller to advertise or hold out or state to the public or to any customer, directly

or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the seller or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this Section shall be guilty of a misdemeanor. The tax herein required to be collected by the seller shall constitute a debt owed by the seller to this state.

Section VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. Every such seller maintaining a place of business in this state shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property sold by such seller, the storage, use or consumption of which became subject to the tax imposed by

this act during the preceding quarterly period and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the seller during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by sellers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath. Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and

with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the state of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent, but need not be verified by oath. For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this state unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this state by the purchaser thereof was purchased from a retailer on and after March 1st, 1939, for storage, use or other consumption in this state.

Section VII. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the Department under the provisions of Sections VIII and IX hereof, within the time required by this act shall pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent (10%) thereof, plus interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Section VIII. If the Department is not satisfied with the return and payment of the tax or amount of tax herein required to be paid to the State by any person, it is hereby authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If any part of the deficiency for which a determination of an addi-

tional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent (10%) of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent (25%) of such amount shall be added thereto. The Department shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served personally or by mail. If by mail, said notice shall be addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the Department and sent by registered mail, return receipt requested.

Section IX. If any person neglects or refuses to make a return required to be made by this act, the Department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this Act, and upon the basis of said

estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent (25%) of the amount required to be paid by such person shall be added thereto in addition to the ten per cent (10%) penalty as above provided. Promptly thereafter the Department shall give to such person written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XI. Any person from whom an amount is determined to be due under the provisions of Sections VIII or IX hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty-day

period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty-day period, the Department shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person, his agent or attorney an oral hearing and shall give such person ten days' notice of the time and place thereof. The Department shall have power to continue the hearing from time to time as may be necessary. The order or decision of the Department upon a petition for redetermination shall become final thirty days after service upon such person or notice thereof. All amounts determined to be due by the Department under the provisions of Section VIII or IX hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent (10%) of the amount determined to be due. Any notice required by this Section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XV. All taxes or amounts herein required to be collected not paid to the Department on the date when the same becomes due and payable shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from and after

the date when the same became due and payable until paid.

Section XVI. If upon examination it is amount of tax or an amount to be collected has been paid to the state in excess of the amount properly due, then the amount in excess shall be credited against any tax or amount required to be collected then due from such person and any balance of such excess shall be refunded to such person by whom such overpayment was made, by certificate of overpayment issued by the Department to the State Comptroller. If approved by the Comptroller, he shall draw his warrant on the State Treasurer for the amount so certified to be due.

Section XVII. If fraud or evasion on the part of any person is discovered by the department, it shall determine the amount by which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent (25%) thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts should

have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in Section VII hereof shall attach thereto.

Section XVIII. The tax or any amount required to be collected hereunder together with interest and penalties imposed by this Act shall be a lien upon the property of the person required to pay such tax or other amount to the State, and the provisions of the revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXII. All taxes, fees, interest and penalties imposed and all amounts of tax herein required to be paid to the state under this act must be paid to the Department of Revenue at Montgomery, Alabama, with remittances payable to the State Treasurer of Alabama. The funds received or collected by the Department under the provisions of this act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the Department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of

teachers in the elementary and high schools of the State.

Section XXIV. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with in-

terest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

Section XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the Department, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense. Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall be guilty of misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300) and not more than five thou-

sand dollars (\$5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Section XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

Section XXVII. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this act shall be held unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this act. It is hereby declared to be the legislative intent that this act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, and word or words not been included herein.

Approved February 28, 1939.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a

shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, Title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * **

MILITARY POSTS

* * * * * emergency construction, \$47,-
976, 962, including the acquisition of neces-
sary land therefor, without regard to the pro-
visions of sections 355 and 1136, Revised
Statutes, as amended (10 U. S. C. 1339; 40
U. S. C. 255); * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong.,
3d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and

power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of War or the Secretary of the Navy.

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CLERK

**In The
Supreme Court of the United States**

OCTOBER TERM, 1941

No. 603

**JOHN C. CURRY, individually and as Commissioner
of Revenue of the State of Alabama, Petitioner,**

vs.

**UNITED STATES OF AMERICA and DUNN
CONSTRUCTION COMPANY, INC. and JOHN
S. HODGSON & COMPANY, partners, doing
business as DUNN CONSTRUCTION COM-
PANY, INC. AND JOHN S. HODGSON &
COMPANY.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA**

BRIEF FOR PETITIONER

✓ **THOMAS S. LAWSON,**
*Attorney General of the State
of Alabama;*

✓ **JOHN W. LAPSLEY,**
Assistant Attorney General

✓ **J. EDWARD THORNTON,**
Assistant Attorney General

GARDNER F. GOODWYN, JR.,
Of Counsel

In The
Supreme Court of the United States

At the City of New York

January 10, 1901

THE UNITED STATES OF AMERICA
vs.

JOHN J. HENRY, JR.
and
JOHN J. HENRY, JR.
and
JOHN J. HENRY, JR.

Defendants.

Presented by the United States.

By the United States.

By the United States.

By the United States.

By the United States.

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**In The
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OCTOBER TERM, 1941

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v.

UNITED STATES OF AMERICA and DUNN
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PANY, INC. AND JOHN S. HODGSON &
COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ALABAMA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Montgomery
County, Alabama, in Equity (R. 124, 125), is not
reported.

The opinion of the Supreme Court of Alabama (R. 131, 132) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 582.

JURISDICTIONAL STATEMENT

The decree of the Supreme Court of Alabama was entered on July 29, 1941 (R. 130). The petition for writ of certiorari was filed on September 11, 1941 (R. 136), and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Use Tax Act with respect to the storage, use, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same under and pursuant to a "Cost-Plus-a-Fixed Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session and Special Session, 1939, p. 96), and of the Acts of Congress (Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343, the Act of July 2, 1940, Public No. 703, 76th Cong., 3d Sess., c. 508, and the Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787), are printed in the Appendix, *infra*.

STATEMENT

All of the tangible personal property, the storage, use or consumption of which is involved in said assessment related to materials purchased at retail by the respondents, Dunn Construction Company and John S. Hodgson & Company, from points outside of the State of Alabama under and pursuant to a "Cost-Plus-a-Fixed Fee Construction Contract" with the United States, for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama (R. 64).

Such contract was executed under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public No. 611, 76th Cong., 3d Sess. c. 343, and the Act of July 2, 1940, Public No. 703, 76th Cong., 3d Sess., c. 508, (Appendix, *infra*, pp. 60, 61)

Under the provisions of Section IX of the Alabama Use Tax Act, the assessment was made on May 8, 1941, against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of Forty-six and 26/100 Dollars (\$46.26), being an amount equal to two per cent (2%) of the sales price of such property, together with the sum of Four and 63/100 Dollars (\$4.63) as penalty, and the sum of 23/100 Dollars (\$.23) interest, amounting in the aggregate to the sum of Fifty-one and 12/100 Dollars (\$51.12) (R. 49).

The respondent contractors on the same day paid to the State Department of Revenue, under protest, the amount of said assessment. (R. 49).

Under the provisions of Section XXIV of such Act, the respondent contractors, together with the United States of America, filed a petition in the Cir-

cuit Court of Montgomery County, Alabama, in Equity, against John C. Curry, as Commissioner of Revenue, praying for a declaratory judgment to determine the liability of the respondent contractors for the amount so paid or their rights to a refund thereof (R. 1-41; amended petition R. folio 40-46).

The trial Court upheld the validity of the assessment (R. 124, 125), from which an appeal was taken by the respondents to the Supreme Court of Alabama (R. 125, 126).

In the trial of the cause in the Circuit Court and on appeal in the Supreme Court, the respondents contended that the "storage, use, or other consumption of the tangible personal property which is the subject of the tax in controversy were the storage, use, or other consumption by the United States or by an agency or instrumentality of the United States on behalf of the United States, and are constitutionally immune from taxation by the State of Alabama," and that the United States had not consented to the imposition of the tax in controversy.

The petitioner contended that the tax as imposed upon the respondent contractors was valid; that the storage, use, or other consumption which was the basis of the tax was a storage, use, or other consumption by the respondent contractors, a private corporation and partnership composed of individuals, both engaged in business for private profit, who were not acting as instrumentalities of the United States; that the imposition of the tax upon the contractors

did not constitute an undue burden upon the United States; that the United States waived any immunity with respect to such tax in that: by the terms of the contract the United States consented to the payment by said contractors of such taxes, and provided for the reimbursement thereof, as a part of the cost of such construction.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting; and on the authority of the decision in the companion case in such Court of *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, reversed the decree of the trial Court and rendered a final decree in favor of the respondents and against the petitioner (R. 131-132).

This is a companion case to No. 602, *State of Alabama, Petitioner, v. King and Boozer et als.*, in which certiorari was granted on October 13, 1941.

The purchases of all the property and the storage, use, or consumption thereof involved in said assessment took place in substantially the same manner as particularly stipulated with respect to certain roofing material purchased by the contractors from the Certainteed Products Company of Atlanta, Georgia (R. 64, 65). The contractors submitted the purchase order to Certainteed Products Corporation of Atlanta, Georgia, and the materials therein ordered were shipped by such vendor by freight from Atlanta, Georgia, to "United States Construction Quartermaster, at Fort McClellan, Alabama, Ac-

count of Dunn Construction Company, Inc., and John S. Hodgson & Company." Such materials, upon arrival at destination, were unloaded, and after being inspected by representatives of the contractors and the United States, were placed in a general warehouse located within said Fort McClellan, which warehouse belonged to the United States, and was used for the storage of materials purchased in connection with the performance of said contract. Such materials were thereafter withdrawn and used by contractors as and when needed by them in the performance of said construction contract (R. 65; 66).

After delivery of the goods to the respondent contractors and the payment therefor by the contractors with their own funds (R. 66), they received reimbursement therefor from the United States (R. 67). The invoice rendered the contractors did not include the Alabama sales or use tax (R. 74); and no such tax was paid to the State of Alabama by either the vendor or the contractors prior to the making of said assessment. (R. 67).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * * * * " at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and sub-

ject in every detail to his supervision, direction, and instructions" (R. 14); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars (\$128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 16)

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS (\$3,204,588.00), as stated in Article I (R. 15).

Article II of the contract, among other things, provided as follows:

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. 16).

Article V of the contract under the head of "Special Requirements" contained, among other provisions, the following:

"1. The contractor hereby agrees that he will:"

"(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, sup-

plies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases without the prior approval of the Contracting Officer." (R. 24)

The purchase orders, as shown by copy of a typical purchase order (R. 71, 72, 73), after approval by the Constructing Quartermaster, were given by the contractors to the vendors. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTING QUARTERMASTER At Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. 71)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 72)

The following, among other instructions, were endorsed on each purchase order:

"2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala.:

"A. Original and two (2) copies of Bill of Lading, or shipping papers.

"Bills of Lading, etc., must read

United States Construction Quartermaster
at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company and must also bear Purchase Order Number.

"B. Six (6) copies of invoice, properly filled and certified as follows:

"I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. 72)

In addition to the exhibits attached to the agreed statement of facts, four other exhibits were introduced on behalf of the complainants in the Court below. These exhibits were numbered one to four, inclusive, and are as follows:

Exhibit B to State of Evidence (R. 107-110) is a letter, designated as fixed-fee letter No. 5, from the office of the Quartermaster General of the War Department at Washington, D. C., to Constructing Quartermasters throughout the country, and deals with the relations between the Constructing Quartermaster and the contractor on a cost-plus-a-fixed-fee contract.

Exhibit C to Statement of Evidence (R. 111-115) is a letter dated February 19, 1941, designated as Construction Division Letter No. 101, from the office of the Quartermaster General of the War Department at Washington, D. C., to all zone Constructing Quartermasters, to all local Constructing Quartermasters, to all architect-engineers, and to all construction contractors dealing with the responsibility of local Constructing Quartermasters and their relationship with architect-engineers and construction contractors on projects.

Exhibit A to Statement of Evidence (R. 89-107) is designated as "SUPPLEMENT TO GUIDE FOR CONSTRUCTING QUARTERMASTERS REVISED 1940 COVERING FIXED FEE PROJECTS," and was issued by the office of the Quar-

termaster General on August 27, 1940. The matter contained in this supplement was stated to be intended as general information only to aid the Constructing Quartermasters and their assistants in connection with fixed-fee contracts covering construction work.

Exhibit D to Statement of Evidence (R. 115-120) is a stenographic report of a conference held in Washington, D. C., on September 6, 1940, with Mr. W. R. J. Dunn, of the Dunn Constructing Company, Inc., and Mr. John S. Hodgson of John S. Hodgson and Company, of Birmingham, Alabama, representing the contractors, and Lieutenant-Colonel E. G. Thomas, Mr. H. W. Loving, and Mr. R. J. O'Brien, representing the Government, relating to the construction of Camp McClellan, Alabama.

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In holding that the assessment made against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, under the provisions of the Alabama Use Tax Act, was repugnant to the Constitution of the United States.

2. In holding that the storage, use, or other consumption of tangible personal property by the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States was constitutionally immune from the Alabama Use Tax.

3. In holding that such contractors were not independent contractors, but were instrumentalities or agents of the United States, in purchasing, storing or using the tangible personal property involved in said assessment.

4. In holding that the United States had not authorized or consented to the payment of said tax by

such contractors as a part of the cost of the construction.

5. In rendering its final decree of July 29, 1941, reversing the decree of the Circuit Court of Montgomery County, Alabama, in Equity, and in rendering a decree in favor of respondents against petitioner.

SUMMARY OF ARGUMENT

I.

THE STORAGE OR USE OF TANGIBLE PERSONAL PROPERTY PURCHASED AT RETAIL BY CONTRACTORS UNDER A COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES IS SUBJECT TO THE ALABAMA USE TAX.

A. THE NATURE OF THE TAX INVOLVED.

The tax involved in this case is a use tax, a non-discriminatory excise tax upon the storage or use of tangible personal property purchased at retail, and is imposed at the same rate as under the Alabama Sales Tax Act, to which Act the Alabama Use Tax Act is complementary. Property purchased subject to the Sales Tax is exempted from the use tax.

The use tax is imposed upon the consumer, which term is specifically defined in the Act. There is no provision authorizing or requiring the consumer to pass on the use tax.

B. THE TANGIBLE PERSONAL PROPERTY WAS "STORED, USED, OR OTHERWISE CONSUMED" BY THE CONTRACTORS WITHIN THE MEANING OF THE ALABAMA USE TAX ACT.

The materials were purchased by the contractors, in their own names, with their own funds, for construction purposes, and not for "sale in the regular course of business". Such a purchase constituted a purchase at retail as defined in the Act. Upon delivery, the materials were stored or used by the contractors within the meaning of such terms as defined in the Act.

No provision in the contract or in the Act under which the contract was executed authorized the contractors to purchase as agents for the Government. The contract specifically prohibited them from bind-

ing or purporting to bind the Government, of which limitation the vendor was given notice endorsed upon the order.

The retention of the property, or the exercise or claim of any property right therein by the contractors constituted a taxable incident under the Act. The transactions had a "taxable moment."

C. THE CONTRACTORS IN THE PURCHASE AND USE OF THE MATERIALS, WERE INDEPENDENT CONTRACTORS.

The legislative history and an analysis of the several Acts of Congress authorizing the execution of the Cost-Plus-a-Fixed-Fee form of contract in connection with the National Defense Program clearly show that Congress did not intend to change the status of the contractor to that of an instrumentality of the Government, with respect to any of his activities.

See brief of Petitioner in the companion case No. 602 for further discussion on this point.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

See brief of Petitioner in the companion case No. 602.

- E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

See brief of Petitioner in the companion case No. 602.

- F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

See brief of Petitioner in the companion case No. 602.

- G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

See brief of Petitioner in the companion case No. 602.

II.

THE UNITED STATES CONSENTED TO THE TAX UPON THE CONTRACTORS

Under Article II 1 (m) of the contract, State sales and use taxes which might apply with respect to materials, and which were required to be paid by the contractor, were included as expenditures constituting a part of the cost of construction, and

reimbursable as other items of cost. Such provision was in the particular form of contract authorized by Congress to be executed in this instance (Act of July 2, 1940, Public No. 703, 76th Congress, 3d Session, c. 508, Appendix, *infra*, p. 58). It was, therefore, duly authorized, and is binding upon the Government.

Congress had already refused to authorize any change in the status of the contractors, or to immunize or exempt them from such State taxation (Rejection of Senate Amendment No. 120 to H. R. 8438, (Act of June 11, 1940, Pub. No. 588, 76th Cong., 3d Sess. c. 313), Congressional Record, 76th Congress, 3d Session, Vol. 86, Part 7, pp. 7518, 7527-7539).

Also, the Congress thereafter, in the passage of the Buck Resolution, (Act of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787, Appendix, *infra*, p. 61), expressly consented to the application of sales and use taxes upon Federal areas, effective after December 31, 1940. One of the purposes of such Act was to remove any barriers to the imposition of such State taxes with respect to the operations of Government contractors upon Federal areas.

III

**THE USE TAX APPLIED WITH RESPECT TO
MATERIALS STORED OR USED BY THE
CONTRACTORS WITHIN THE MILI-
TARY RESERVATION OF FORT
McCLELLAN, ALABAMA.**

By the passage of the Buck Resolution (Act of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787, effective after December 31, 1940), jurisdiction over Federal areas was restored to the States, specifically with respect to the application of sales and use taxes. The transactions here involved occurred after the effective date of such Act.

ARGUMENT

I.

**THE STORAGE OR USE OF TANGIBLE PER-
SONAL PROPERTY PURCHASED AT RE-
TAIL BY CONTRACTORS UNDER A COST-
PLUS-A-FIXED-FEE CONSTRUCTION
CONTRACT WITH THE UNITED
STATES IS SUBJECT TO THE ALA-
BAMA USE TAX.**

A. THE NATURE OF THE TAX INVOLVED.

The tax here involved, referred to as a "use tax", is a non-discriminatory tax levied under the provi-

sions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session, 1939, pp. 96-109).

Section II of this Act (Appendix, *infra* pp. 43, 44) imposes an excise tax "on the storage, use or other consumption in this state of tangible personal property purchased at retail on and after the effective date of this act, for storage, use or other consumption in this state at the rate of two (2) per cent of the sales price of such property," except as provided in subsection (b) of said section where a lesser rate ($\frac{1}{2}$ of 1%) is imposed with respect to automobile vehicles.

Section III contains provisions expressly exempting property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the Alabama Sales Tax Act. This section also exempts, *inter alia*, the following:

"(b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state." (Appendix *infra*, p. 43).

The tax is required to be paid by the consumer to any seller "engaged in the business of selling at retail in this State" (Section IV), otherwise the consumer is required to report and pay the tax directly to the State (Section VI).

Section I (e) provides: "Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold."

In subsection (g) and (h) of Section I the terms "storage" and "use" are defined as follows:

"(g) The term 'storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail."

"(h) The term 'use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business."

The Alabama Use Tax Act is complementary to the Alabama Sales Tax Act; and, therefore, such Acts should be construed as companion measures.

In practical effect, the use tax prevents discrimination, in trade or tax, against retailers within the State. It equalizes the tax burden, so that the consumer within the State will bear the same tax bur-

den whether he buys within or from without the State.

As stated by Mr. Justice Cardozo in the case of *Henneford v. Silas Mason Company*, 300 U. S. 577, 582, 583 (1937) :

“* * * A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.”

See :

Monamotor Oil Co. v. Johnson,
292 U. S. 86, (1934).

Henneford v. Silas Mason Co.
300 U. S. 577, *supra*.

Felt & Tarrant Mfg. Co. v. Gallagher,
306 U. S. 62 (1939).

Southern Pacific Co. v. Gallagher,
306 U. S. 167 (1939).

The above cited cases support the conclusion that the storage, use, or other consumption of tangible personal property, after its interstate journey has ended, are proper subjects of state taxation. As expressed by Mr. Justice Stone (now Mr. Chief Justice

Stone), in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 52, (1940) :

“As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements.”

By a comparison of the Alabama Use Tax Act (Appendix, *infra*, p. 40) with the Alabama Sales Tax Act, (See Appendix, pp. 84-96, in brief in the companion case of *State of Alabama, Petitioner, v. King & Boozer, et al*, No. 602), it will be seen that, in effect, the Use Tax Act imposes the same tax burden as the Sales Tax Act, with respect to tangible personal property, but exempts property, the gross proceeds of sales of which are required to be included in the measure of the sales tax.

B. THE TANGIBLE PERSONAL PROPERTY WAS
“STORED, USED, OR OTHERWISE CONSUMED” BY
THE CONTRACTORS WITHIN THE MEANING OF
THE ALABAMA USE TAX ACT.

The tangible personal property involved in this assessment was purchased by the contractors and was “purchased, shipped, delivered, paid for, stored, used or consumed, and reimbursement therefor made in substantially the same manner” as detailed with respect to a particular transaction involving the

purchase of building materials, namely, roofing, purchased from Certainteed Products Company, Atlanta, Georgia, except for differences in the name of the vendors, location of vendors and points of origin or shipment from points outside the State to Fort McClellan (R. 64, 65); and all of such property was used by said contractors, in the manner stated, in the performance of said contract, during the tax period covered by such assessment, namely, January 1, 1941, to March 31, 1941 (R. 68).

The typical transaction detailed in the statement of facts shows that certain roofing material was purchased by the contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, from the Certainteed Products Company of Atlanta, Georgia, pursuant to and for use in the performance of their contract with the United States. The purchase order was placed by the contractors, in their own names, on January 16, 1941 (R. 65). On January 20, 1941, the materials were shipped (R. 66), and were received by the contractors at Fort McClellan, Alabama, on January 20, 1941, as shown by the Receiving and Inspection Reports (R. 73, 74). The shipment of such materials was consigned to the "United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company" (R. 65). The invoice therefor, pursuant to instructions on the order, was rendered to and only against the contractors and stated thereon "Sold to: Dunn Construction Co., Inc. & John S. Hodgson & Co. Ft. McClellan, Ala." (R. 74). The invoice was

received February 8, 1941, (R. 66), and within 48 hours from the date of the approval of the invoice (February 20, 1941), the amount thereof was paid by the contractors to the vendor by check drawn by the contractors upon their joint account in The First National Bank of Anniston, Alabama, and which check was duly paid upon presentation (R. 66, 67). Thereafter, on March 5, 1941, the contractors submitted to the Government a voucher for reimbursement for such purchase, which voucher was paid on March 11, 1941 (R. 67). No sales or use taxes were paid to the State of Alabama with respect to any of such materials before the making of such assessment (R. 68). The amount of the assessment, including penalty and interest thereon to May 8, 1941, was \$51.12 (R. 9), and was paid by the contractors under protest on May 8, 1941 (R. 12).

After delivery of the materials at Fort McClellan, Alabama, it was shown that, as and when the contractors required said materials in such construction work, the same were withdrawn by them and used by them in such construction work, in the performance of said contract (R. 66); all of which materials it was stipulated were so used during the period from January 1, 1941, to March 31, 1941 (R. 68).

During the interim from the delivery of the materials to the time of their actual use in the construction, it appears that the materials remained in a general warehouse belonging to the United States,

located within Fort McClellan, in which all of such materials so purchased were stored, until required by the contractors in the construction work, when the same were withdrawn by them and used in the construction work in the performance of said contract. (R. 66).

The record, therefore, clearly establishes that the transactions involved in the assessment, as to both purchase and use by the contractors, occurred during the period of the assessment, namely, between January 1, 1941, and March 31, 1941.

The specific incident constituting the storage or use by the contractors may be referred to the "keeping or retention" of the property, which would include (a) the receiving and inspection of the materials at destination (R. 66, 73, 74), an act performed for the contractors by their own employe; or (b) the subsequent placing of the materials in the storage warehouse; or (c) the exercise of any right or power over the property incident to the ownership thereof, even such as a transfer of title to the Government, other than a sale in the regular course of business.

Such incidents were defined as taxable in subsections (g) and (h) of Section I of the Act (Appendix, *infra*, pp. 41- 42), and the occurrence of one or more of such incidents was established by the evidence. However, we do not concede that such title, if any, as vested in the Government before installa-

tion prevented the application of the tax on the contractors for their "storage or use" of the property before it became affixed to the realty. Such storage or use has been construed by this Court as taxable, and proof thereof as having been established by the slightest retention or exercise of a right of ownership of the property after it has ceased its interstate journey. See *Sou. Pac. Co. v. Gallagher*, 306 U. S. 167, 176, 177, *supra*; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 67, *supra*;

Henneford v. Silas Mason Co., 300 U. S. 577, 582, 583, *supra*;

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, *supra*;

Pacific Telephone and Telegraph v. Gallagher, 306 U. S. 182, 187 (1939);

Cf. Dept. of Treasury of the State of Indiana v. Wood Preserving Corp., 85 L. Ed. 817 (1941).

The prior approval by the Constructing Quartermaster of the contractors' purchase orders did not prevent the purchase from being made by the contractors. Such orders are not susceptible of any construction that the purchase was being made by the United States, or by the contractors in the capacity of agents for the Government, for the reason that the contractors were required to endorse on each order the statement, "This purchase order does not

bind, nor purport to bind, the United States Government or Government officers thereunder." (Article V 1 (c) of the contract, (R. 24, 25).

The endorsement on the purchase order of the statement, "This order is placed for the benefit of, and is assignable to, the United States Government", did not change the terms of the contract of sale between the vendor and the contractors, for the reason that there was no assignment of the order to the United States. Certainly the indirect or general benefit which might be said to accrue or enure to the Government by virtue of the purchase of materials by the contractors, in furtherance of their obligations under the contract, did not affect the legal title to the property, nor prevent the consummation of the purchase between the vendor and the contractors. Unless the right of assignment of the order had been executed, there was no privity of contract between the vendor and the Government. See *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 (1927); *United Painting & Decorating Co. v. Dunn*, 137 Ga. 307, 73 S. E. 493 (1912); Cf. *United States v. Driscoll*, 96 U. S. 421 (1877); *Hurfurth v. United States*, 89 C. Cls. 122, 127 (1939); *Alexander v. Alabama Western R. R. Co.*, 179 Ala. 480, 60 So. 295 (1912)).

The provision of the contract (Article I (3), R. 16) under which title to materials may be vested in the Government prior to installation has no field of operations prior to the consummation of the pur-

chase by the contractors. We do not think it requires any argument to show that the shipment and delivery of the materials to the Constructing Quartermaster for the account of the contractors, in legal effect, would be the shipment and delivery to the contractors direct, so far as such incident affects any question here involved. Clearly, the Constructing Quartermaster in receiving such shipment was either acting as agent for the contractors, or would be construed as receiving and holding the materials in trust for the contractors. The contractors, the taxpayers, of course, still claimed and enjoyed a right of ownership therein, and, for profit, subsequently made actual use of the materials.

The record fails to show that there was any formal written "acceptance in writing by the Contracting Officer" of the materials here involved prior to installation, as contemplated by the title provisions mentioned above. It seems doubtful that the routine receiving and inspection reports (R. 73, 74) were intended by the parties as a strict compliance with the title provisions of the contract.

Such title provision was inserted in the contract form pursuant to Section 4 (c) of the Act of April 25, 1939 (Public No. 43, 76th Congress, 1st Session, c. 87), which authorized the Secretary of the Navy to include such provision "to minimize insurance costs."

Furthermore, the contractors retained a beneficial use therein—the right to use the materials in the performance of the construction in compliance

with their contractual obligations. Such privilege or right was a taxable event as between the State and the contractors, and the Government by the terms of the contract had waived any right to object to the consequential burden of such a non-discriminatory tax, the very *form* of which contract was expressly authorized by Act of July 2, 1940 (Appendix, *infra*, p. 58).

Even if the conclusion is reached that title to the materials became vested in the Government, such title was acquired from the contractors either contemporaneously with or subsequent to the delivery of the materials at Fort McClellan, Alabama, and under the decisions of this Court, such a transaction unquestionably had its "taxable moment." See *Sou. Pac. v. Gallagher*, 306 U. S. 167, *supra*; *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182, 186, 187, *supra*; and *Dept. of Treasury of the State of Indiana v. Preserving Corp.*, 85 L. Ed. 817, *supra*.

Reference is here made to the brief filed on behalf of Petitioner in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602, for further discussion of questions relating to the purchase and use of materials by the contractors (pp. 35-42 of such brief).

C. THE CONTRACTORS IN THE PURCHASE AND USE OF THE MATERIALS, WERE INDEPENDENT CONTRACTORS.

In support of this point, reference is made to the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 42-52 of such brief).

In the passage of the Act of July 2, 1940, (Appendix, *infra* p. 58) under which the "cost-plus-a-fixed-fee form of contract" here involved (R. 13-41) was authorized and executed, Congress well understood and clearly intended that the relationship of the contractors to the Government and their status would be that of independent contractors, both in furnishing materials and in performing the work of construction. And, that such contractors in one instance would be left subject to nondiscriminatory sales and use taxes, except where the contractors enjoyed the protection of Federal jurisdiction over the area of activity, and in the other instance would be subject to Federal Social Security and State Unemployment Compensation taxes, even upon Federal areas.

To refute such construction, it would be necessary to charge Congress with ignorance of the many decisions of this and other Courts that the relationship of Government contractors is not such as to confer upon the contractor the immunity of the sovereign. Certainly Congress was aware of such historic

decisions as *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), and *Silas Mason & Co. v. Tax Commission*, 302 U. S. 186, (1937) in which the contractors were held subject to State taxation even upon their gross income from the Government.

But in this instance it is not necessary to glean the legislative intent from fields of speculation. Congress said what it meant, and meant what it said. The contract was to produce a contractor, not create an unheard of governmental instrumentality with guaranteed private profits upon the entire cost, clothed with an immunity from taxation for which state and federal contractors have fought in vain for over a century.

And it would certainly be extravagant to charge that Congress unwittingly authorized the creation by contract of an agent who, in the magic of his own name, could contract for the Government with mine, merchant and factory, without imposing legal liability upon his principal or subjecting himself to the State's constitutionally reserved power of taxation yet, in all other respects would remain a prosaic contractor subject to the burdens of Federal Social Security and State Unemployment Compensation taxes.

It must be remembered that this same Congress had only a few days before (on June 4th and 5th, 1940) debated and defeated such a proposal in the

consideration of another National Defense bill. (Senate Amendment No. 120 to H. R. 8438 Act of June 11, 1940, Pub., No. 588, 76th Cong., 3rd Sess., C. 313). Yet that which the legislative branch of the Government in no uncertain manner rejected is now being sought by strained construction from the judicial. But, it is said, the contractors have no stake at issue. That the invalidation of the tax will not increase their profit, or the payment impose a burden, as they hold a valid contract for reimbursement. However, if the Court concludes the supervision and control by the Government over purchases is sufficient to create the relationship of principal and agent, it is difficult to see how their independence in the work of construction may at the same time be so preserved as to compel them to pay Social Security and Unemployment Compensation taxes.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

On this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 52-57 of such brief).

- E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 57-62 of such brief).

- F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 62-66 of such brief).

- G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 66-70 of such brief).

II

THE UNITED STATES CONSENTED TO THE
TAX UPON THE CONTRACTORS.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 70-79 of such brief).

The clause in the contract providing for the payment by the contractors of certain taxes, and reimbursement therefor, as a part of the cost of construction, as other items of cost under Article II of the contract (Article II 1 (m), R. 19) reads as follows:

“(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization. materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor.”

It will be noted that the contractor was required to pay the Federal Social Security tax “from his own funds.” It is evident that the quoted words had ref-

erence to that portion of the Social Security tax imposed upon the employer, and was no doubt intended to make it clear that he would not be permitted to escape his portion of the tax or contribution, and also was intended to limit the amount of reimbursement to the contractors' share only. Although he deducts and remits the employee's share of the contribution or tax, he was not to profit thereby.

The word "applicable", inserted with respect to the payment of State and local taxes required to be paid by the contractor "on or for" materials, etc., was apparently inserted to cover contingencies or conditions which, in some instances, would prevent the application of any State tax with respect to materials. As, for instance, where exclusive jurisdiction had been ceded by the State to the Government over the area upon which the otherwise taxable transaction might occur. (See *State of Alabama v. Algernon Blair*, 238 Ala. 377, 191 So. 237 (1939); Cf. *O'Pry Heating and Plumbing Company v. State*, 3 So. (2d) 316 (1941).) The terms of the cession to the Government of Federal areas, and the reservations or restrictions therein, in many instances, involved difficult questions of construction, as to whether the State had the power or right to impose a particular tax. *Buckstaff Bath House v. McKinley*, 308 U. S. 358 (1939); *James v. Dravo Contracting Co.*, 302 U. S. 134, *supra*; *Silvs Mason Co. v. Tax Comm.*, 302 U. S. 186, *supra*; *Atkinson v. Tax Comm.* 303 U. S. 20 (1938). Cf. *Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940).

It will be remembered that at the time of the adoption of the form of contract involved in this case (C. P. F. F. Form No. 1, approved by the Assistant Secretary of War July 12, 1940) the question of imposing sales and use taxes upon Federal areas had not been acted upon by Congress. (1) It is, therefore, our contention that these circumstances presented instances in which the tax might not be applicable even though demanded by the State.

The adoption of the Buck Resolution (Appendix, *infra*, p. 61), effective after December 31, 1940, thereafter restored to the several States power and jurisdiction to impose sales and use taxes upon Federal areas to the same extent and in the same manner as though such area was not a Federal area. Therefore, we believe that upon a proper construction of the tax provision in the contract, it will be seen that the term "applicable", with respect to State sales and use taxes, was not inserted with reference to any governmental immunity intended to be conferred upon the contractors, in their person or property. Our construction is supported by the fact that there was no statute authorizing the appointment, designation, or employment of contractors, as *agents*, or authorizing them to act as agent of the Government, or conferring upon them any general or specific immunity or exemption from State taxation. There was no provision in the contract to such effect, nor had any authoritative Court decision been

(1) See Act of October 9, 1940, Public, No. 819, 76th Congress, 3rd Session, c. 787 (Appendix, *infra*, p. 61).

rendered holding Government contractors immune by reason of their status or relationship, under any form of contract.

It is true that the word "applicable" as there used would also cover any instance where the tax might be discriminatory or otherwise invalid. In such case, the contractor would be required to resist the demand.

But, it would be difficult to draft a provision more specifically consenting and agreeing that the various State and local taxes, of a nondiscriminatory character, required to be paid by the contractor in purchasing or using materials in the performance of the contract within areas subject to State jurisdiction, should be so paid, and that the amount thereof would be reimbursed to the contractor as other items included in the cost of the construction, with the result that the consequent economic burden would thereby be assumed by the Government as a contractual obligation.

III

THE USE TAX APPLIED WITH RESPECT TO MATERIALS STORED OR USED BY THE CONTRACTORS WITHIN THE MILITARY RESERVATION OF FORT McCLELLAN, ALABAMA.

All of the transactions, including the purchase and use of the materials here involved, occurred between

January 1, 1941, and March 31, 1941 (R. 64, 68), after the effective date of the Buck Resolution (Act. of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787) (Appendix, *infra*, p. 61), in and by which Congress expressly consented to the application of State sales and use taxes upon Federal areas.

One of the evident purposes of this Act was to subject Government contractors to such nondiscriminatory State taxation in any State, regardless of the terms of the cession to the United States, or the various restrictions imposed by the different States. See *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, *supra*; *James v. Dravo Contracting Company*, 302, U. S. 134, *supra*; *Henneford v. Silas Mason Co.*, 300 U. S. 577, *supra*.

In view of the adoption and effectiveness of the Buck Resolution, we do not deem it necessary to further discuss the applicability of the use tax as imposed upon the contractors within the Federal area of Fort McClellan, Alabama. The Use Tax Act specifically included areas "owned by or ceded to the United States." (Section I (k), Appendix, *infra*, p. 43).

CONCLUSION

The storage or use of the tangible personal property involved in this case was with respect to tangible personal property, in this case building materials, purchased by the contractors, as consumers, at retail, and stored or used by them within the meaning of the Alabama Use Tax Act. Since the contractors are shown to have purchased, stored, and used the materials in their capacity as independent contractors, during a period within which the objection of exclusive Federal jurisdiction had been removed, the tax was applicable, and in no wise repugnant to the Constitution of the United States. Furthermore, since Congress approved the contract, including the provision for the payment of and reimbursement for such taxes as a part of the construction cost, the Government may not intervene or otherwise prevent the payment of the tax by the contractors, solely for the purpose of being relieved of its consequent economic burden. Therefore, the decree of the Court below is erroneous and should be reversed.

Respectfully submitted,
THOMAS S. LAWSON,
*Attorney General of the State
of Alabama;*

JOHN W. LAPSLEY,
Assistant Attorney General
J. EDWARD THORNTON,
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GARDNER F. GOODWYN, JR.,
Of Counsel

APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

Section 1. DEFINITIONS. The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this Section, except where the context indicates a different meaning: (a) The term "person" or the term "company" herein used interchangeably, includes any individual, firm, company, partnership, association, corporation, receiver or trustee, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b) The term "Department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient

or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (e) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (f) The word "business" as used in this act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls. (g) The term "storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of

business or subsequent use solely outside this state of tangible personal property purchased at retail. (h) The term "use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business. (i) The term "purchase" means acquired for a consideration, whether such acquisition was affected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been affected; and whether such consideration be a price or rental in money, or by way of exchange or barter. (j) The term "sales price" means the total amount for which tangible property is sold, including any services (including transportation) that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included and sales price shall not include the amount charged for property returned by customers when the en-

tire amount charged therefor is refunded either in cash or by credit. (k) The term "in this state" or "in the state" means within the exterior limits of the State of Alabama, and includes all territory within such limits owned by or ceded to the United States of America.

Section II. (a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. (b) An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) of the sales price of such automotive vehicle. Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to the State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer

authorized by the Department, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of Section V. hereof, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

Section III. EXEMPTIONS. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the provisions of House Bill 179, approved February 23, 1937 and known as the Alabama Luxury Tax Act or by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. ***** (d) Property stored, used or consumed by the State of Alabama, by the counties within the State, or by incorporated municipalities of the State of Alabama. *****

Section IV. Every seller of tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state, shall within thirty days after the effective date of this act, register with the Department and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Department may require with respect to matters pertinent to the enforcement of this act; Provided, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of House Bill 82 approved February 8, 1939 and any amendments thereto, to register with the Department as provided in this act.

Section V. Every such seller making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section III, hereof, shall at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time of such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Department. The

tax required to be collected by the seller from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales. It shall be unlawful for any such seller to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the seller or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this Section shall be guilty of a misdemeanor. The tax herein required to be collected by the seller shall constitute a debt owed by the seller to this state.

Section VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. Every such seller maintaining a place of business in this state shall on or before the twentieth day of the month following the close of the first quarterly period as above defined,

and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property sold by such seller, the storage, use or consumption of which became subject to the tax imposed by this act during the preceding quarterly period and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the seller during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by sellers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath. Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the

twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the state of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent, but need not be verified by oath. For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this

state unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this state by the purchaser thereof was purchased from a retailer on and after March 1st, 1939, for storage, use or other consumption in this state.

Section VII. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the Department under the provisions of Sections VIII and IX hereof, within the time required by this act shall pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent (10%) thereof, plus interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Section VIII. If the Department is not satisfied with the return and payment of the tax or amount of tax herein required to be paid to the State by any person, it is hereby

authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent (10%) of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent (25%) of such amount shall be added thereto. The Department shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served personally or by mail. If by mail, said notice shall be addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the Department and

sent by registered mail, return receipt requested.

Section IX. If any person neglects or refuses to make a return required to be made by this act, the Department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this Act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent (25%) of the amount required to be paid by such person shall be added thereto in addition to the ten

per cent (10%) penalty as above provided. Promptly thereafter the Department shall give to such person written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XI. Any person from whom an amount is determined to be due under the provisions of Section VIII or IX hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty-day period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty-day period, the Department shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person, his agent or attorney an oral hearing and shall give such person ten days' notice of the time and place thereof. The Department shall have power to continue the hearing from time to time as may be necessary. The order or decision of the Department upon a petition for redetermination shall become final thirty days after service upon such person or notice thereof. All amounts determined to be due by

the Department under the provisions of Section VIII or IX hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent (10%) of the amount determined to be due. Any notice required by this Section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XV. All taxes or amounts herein required to be collected not paid to the Department on the date when the same becomes due and payable shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from and after the date the when same became due and payable until paid.

Section XVI. If upon examination it is determined by the department that an amount of tax or an amount required to be collected has been paid to the state in excess of the amount properly due, then the amount in excess shall be credited against any tax or amount required to be collected then due from such person and any balance of such excess shall be refunded to such person by whom such overpayment was made, by certificate of overpayment issued by the Department to the

State Comptroller. If approved by the Comptroller, he shall draw his warrant on the State Treasurer for the amount so certified to be due.

Section XVII. If fraud or evasion on the part of any person is discovered by the department, it shall determine the amount by which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent (25%) thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts should have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in Section VII hereof shall attach thereto.

Section XVIII. The tax or any amount required to be collected hereunder together with interest and penalties imposed by this Act shall be a lien upon the property of the person required to pay such tax or other

amount to the State, and the provisions of the revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXII. All taxes, fees, interest and penalties imposed and all amounts of tax herein required to be paid to the state under this act must be paid to the Department of Revenue at Montgomery, Alabama, with remittances payable to the State Treasurer of Alabama. The funds received or collected by the Department under the provisions of this act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the Department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the State.

Section XXIV. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be col-

lected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with interest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to

recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

Section XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the Department, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense. Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall be guilty of misdemeanor, and shall for each such offense be fined not less than three hundred dollars (\$300) and not more than five thousand dollars (\$5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Section XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

Section XXVII. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this act shall be held unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this act. It is hereby declared to be the legislative intent that this act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases and word or words not been included herein.

Approved February 28, 1939.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations,

or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*,

That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, Title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Military Appropriation Act, 1941, Public No. 611,
76th Congress, 3d Sess., c. 343:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * *

MILITARY POSTS

* * * * * emergency construction, \$47,-
976,962, including the acquisition of neces-
sary land therefor, without regard to the pro-
visions of sections 355 and 1136, Revised
Statutes, as amended (10 U. S. C. 1339; 40
U. S. C. 255); * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong.,
3d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. (b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of war or the Secretary of the Navy.





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OCT 20 1941

CHARLES ELMORE CROPLEY
CLERK

No. 603

In the Supreme Court of the United States

OCTOBER TERM, 1941

**JOHN C. CURRY, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA,
PETITIONER**

v.

THE UNITED STATES OF AMERICA, DUNN CONSTRUCTION Co., INC., AND JOHN S. HODGSON AND COMPANY, PARTNERS DOING BUSINESS AS DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ALABAMA**

BRIEF FOR THE UNITED STATES

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No. 603

JOHN C. CURRY, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA,
PETITIONER

v.

THE UNITED STATES OF AMERICA, DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY, PARTNERS DOING BUSINESS AS DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY

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STATE OF ALABAMA

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OPINION BELOW

The Circuit Court of Montgomery County, Alabama, delivered no opinion; its decree is found at R. 124-125. The opinion of the Supreme Court of Alabama (R. 131) is reported in 3 So. (2d) 582.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 29, 1941 (R. 130). The peti-

tion for a writ of certiorari was filed on September 11, 1941, and was granted on October 13, 1941. The jurisdiction of this Court is conferred by section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States in storing and using goods is subject to the Alabama tax on the storage, use, or other consumption of tangible personal property.

2. Whether the immunity of the United States, if it exists, is retained when the United States stores and uses property through a cost-plus-a-fixed-fee contractor.¹

STATUTES INVOLVED

The relevant portions of the statutes are set out in the Appendix, *infra*, pp. 16-20.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

1. *This Litigation.* On May 8, 1941, the Department of Revenue of the State of Alabama, pursuant to Act No. 67 of the General Acts of Alabama, 1939 (Appendix, *infra*, pp. 16-20), made a

¹ A third question, as to the territorial jurisdiction of the State to impose the tax, was argued but not decided below and need not be considered here (see Brief for the United States in *Alabama v. King & Boozer*, No. 602, this Term, pp. 26-27, n. 1).

final assessment of tax in the amount of \$51.12, inclusive of penalty and interest, upon Dunn Construction Company, Inc., and John S. Hodgson and Company, partners trading as Dunn Construction Company, Inc., and John S. Hodgson and Company,² with respect to the storage, use, or consumption of tangible personal property purchased outside of Alabama, or in interstate commerce, for storage, use, or consumption in the State, during the quarterly period beginning January 1, 1941, and ending March 31, 1941.

After payment by Dunn & Hodgson under protest (R. 9-12), the United States and Dunn & Hodgson on May 16, 1941, commenced a suit in equity in the Circuit Court of Montgomery County, Alabama (R. 41-48), against John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, for a declaratory judgment determining the tax liability of Dunn & Hodgson and a decree ordering refund of the tax paid by them, together with the penalty and interest thereon, with interest. The amended bill of complaint alleged that the assessment of May 8, 1941, was based upon the sales price of tangible personal property purchased outside the State of Alabama, consisting of roofing materials purchased by the United States, or by Dunn & Hodgson as an agent and instrumentality of the United States and in connection with the performance of

² The partnership is hereafter called Dunn & Hodgson.

their contract with the United States, and stored, used, or consumed by the United States, or by Dunn & Hodgson as an agent and instrumentality of the United States in and about the construction by them, for and on behalf of the United States, of certain buildings, warehouses, and other camp and military facilities at Fort McClellan, Alabama, under their contract with the United States. The bill prayed that the assessment be held void on the ground, among others, that the storage, use, and consumption of the materials were immune under the Constitution of the United States from taxation by the State (R. 46-47).

The Commissioner of Revenue filed a demurrer and an answer to the complaint, alleging, *inter alio*, that the assessment was valid on the grounds that the storage, use, or consumption of property was not by the United States or for or on its behalf but was by an independent contractor which was not such an agent or instrumentality of the United States as would entitle it to claim any immunity from tax, and that the United States in the contract with the contractor consented to the tax and waived any immunity from it (R. 49-62).

On June 13, 1941, the Circuit Court decreed valid the tax assessment made by the Department of Revenue on May 8, 1941 and held that Dunn & Hodgson were not entitled to refund (R. 124-125). The United States and Dunn & Hodgson appealed to the Supreme Court of Alabama. That court on

July 29, 1941, reversed, with one judge dissenting (R. 130-132).

2. *The Dunn & Hodgson Contract in General.* On September 9, 1940, the United States of America entered into a contract with Dunn & Hodgson for the construction of a complete tent camp, including the necessary buildings, temporary structures, utilities, and appurtenances thereto, at Fort McClellan, Alabama. The contract was in effect during the period January 1, 1941, to March 31, 1941, covered by the assessment of tax involved in the present case (R. 63). The provisions of this contract are summarized in the Brief for the United States in *Alabama v. King & Boozer*, No. 602, October Term, 1941, at pp. 4-15.

3. *Acquisition of the Materials Involved in this Case.* It is stipulated (R. 64-65) that all of the tangible personal property with respect to the storage, use or consumption of which the tax assessment was made in this case was purchased, shipped, delivered, paid for, stored, used, or consumed and reimbursement therefor made in substantially the same manner as hereinafter set forth concerning certain roofing material purchased from the Certain-teed Products Corporation, of Atlanta, Georgia.

It is agreed that the Certain-teed Products Corporation and the other vendors of tangible personal property with respect to which tax assessment was made in this case maintain no place of

business in the State of Alabama and have paid no sales or use tax with respect to the sale, storage, use, or consumption of that property (R. 68).

Prior to January 15, 1941, the Certainteed Corporation submitted a proposal to Dunn & Hodgson to sell a quantity of roofing material at a stipulated price, for use by Dunn & Hodgson in the performance of their contract with the United States of September 9, 1940. The proposal was submitted by Dunn & Hodgson to the Constructing Quartermaster at Fort McClellan, Alabama, for approval, and was approved by him (R. 65).

Pursuant to the proposal submitted by the Certainteed Products Corporation, the contractor on January 15, 1941, prepared and submitted to the Constructing Quartermaster a request for purchase of the material, and requested approval by the Constructing Quartermaster of the purchase. His approval was then endorsed on the request for purchase (R. 65).

Thereafter, on January 16, 1941, the contractor submitted to the Certainteed Corporation, at Atlanta, Georgia, an order for the roofing (R. 65). This order was signed by the purchasing agent of the contractor, and directed that the materials described in the order should be shipped to "United States Constructing Quartermaster, at Fort McClellan, Ala. For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. 65, 71). The purchase order provided (R. 72):

This order is placed for the benefit of, and is assignable to, the United States Government.

This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.

Terms of Payment as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice.

The purchase order also directed that copies of the invoice should be properly filled out by the seller and certified as follows (R. 72):

I certify that the above bill is correct and just; that payment therefor has not been received; * * * and that State or local sales taxes are not included in the amounts billed.

Upon receipt of the purchase order, the Certainteed Corporation shipped the roofing material by freight from Atlanta, Georgia (R. 65). On January 20, 1941, the material arrived at Fort McClellan, Alabama, on Southern Railway car 13975, which was placed at a siding within the Fort, where the material was then unloaded from the car (R. 66). At the time of unloading, the material was checked and inspected, and two re-

ports were made (R. 66). One report was made to the Constructing Quartermaster and the other to Dunn & Hodgson; each was signed by an employee of the contractor and by an employee of the United States representing the Constructing Quartermaster, and each verified the receipt and inspection of the specified quantity of roofing material (R. 73-74).

The property, after unloading from the railway car at Fort McClellan, Alabama, was stored in a general warehouse which belonged to the United States and is located within Fort McClellan (R. 66, 73); the warehouse was used for the storage of materials purchased in connection with the performance of the Dunn & Hodgson contract with the United States (R. 66). When the contractor required the materials concerned in this case, they were withdrawn from the warehouse and used in the construction work in performance of the contract (R. 66).

On February 8, 1941, Dunn & Hodgson received from the Certainteed Products Corporation the original invoice for the roofing material described in the purchase order of January 16, 1941 (R. 66, 74). On February 20, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor (R. 66, 75-76). The Constructing Quartermaster then approved the invoice for payment (R. 66, 75).

Thereafter, Dunn & Hodgson issued their joint check to the Certainteed Products Corporation in full payment of the invoice mentioned above, in the amount of \$221.72, being the amount of \$226.25 less two percent discount, which check, upon presentation, was paid in due course (R. 66-67).

On March 5, 1941, the contractor submitted a voucher to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures by it aggregating \$9465.76, including its expenditure of \$221.72 made to the Certainteed Products Corporation (R. 67, 76-77). Neither the check nor the voucher included any amount for Alabama sales or use tax with respect to the roofing material purchased (R. 67). The contractor attached to its voucher the approved request made to the Constructing Quartermaster for the purchase of the roofing, copies of its purchase order to the Certainteed Corporation, the two receiving and inspection reports, and the invoice of Certainteed (R. 67-68).

The Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on March 11, 1941, it was paid by the Finance Officer at Fort McClellan to the contractor through a United States Government check (R. 67).

Dunn & Hodgson made no return to the Department of Revenue of the State of Alabama of the sales price of the purchased materials, the storage,

use, or consumption of which is asserted by petitioner to have been subject to tax under the Alabama statute of 1939 (R. 68). It has made demand upon the United States through the Constructing Quartermaster and the Quartermaster General for reimbursement to it for the amount of tax paid by it under protest to the State after assessment (R. 69).

ARGUMENT

I

THE ALABAMA USE TAX IS IMPOSED UPON THE USER

The use tax is levied by Alabama Laws of 1939, Act No. 67. Section II of that Act (*infra*, p. 16) provides:

* * * (a) An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use, or other consumption in this state at the rate of two percent (2%) of the sales price of such property, * * *. (b) * * *

Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *.

The tax, then, is an excise on the storage, use, or consumption of goods, measured by the retail sales price. The statute denominates the user as the taxpayer, making him liable for the tax. Sec-

tion VI requires him to file a return with the State Department of Revenue and to accompany the return with a remittance of the amount of tax due for the period covered by the return.³ From the foregoing, it cannot be doubted that the use tax is imposed by the Act on the person who uses the goods purchased.

II

THE UNITED STATES IN STORING AND USING TANGIBLE PERSONAL PROPERTY IS IMMUNE FROM USE TAX

Our argument on this score is developed in the brief for the United States in *Alabama v. King & Boozer*, No. 602, this Term, pp. 36-81. It is fully applicable here: The problem of the use tax, as that of the sales tax, presents a question of constitutional immunity because it arises in the silence of Congress. Here, as in the *King & Boozer* case, the problem admits of ready solution under the guiding principle that the United States is immune from any tax imposed upon and paid by the Government itself. As that immunity includes a sales tax, it includes, *a fortiori*, a use tax collected directly from the consumer of the goods.

³ Sections IV and V of the Act provide for collection of the use tax through the retail *seller* in some circumstances, which, however, are not present in this case. Where they do exist, the seller is, nevertheless, required to collect the tax from the user and is forbidden to advertise absorption or rebates. Thus in situations where these statutory sections are operative, the legal incidence of the use tax is still on the user. This point is analyzed with respect to similar provisions of the Alabama sales tax in the brief for the United States in *Alabama v. King & Boozer*, No. 602, this Term, pp. 27-36.

In our *King & Boozer* brief we point out (pp. 70-80) that our case is in truth stronger than indicated by the assumption that Congress had been entirely silent on the question. The *indicia* of congressional intention there detailed are equally applicable here. The acts immunizing government corporations from taxation (*King & Boozer* brief, pp. 74-76) apply equally to use taxes imposed upon those corporations. The Act of October 9, 1940, relating to state sales taxation within the government reservations (*King & Boozer* brief, pp. 76-77) also authorizes the collection of use taxes, except that there should be no "collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to * * * storage, or use of tangible personal property sold by the United States or any instrumentality thereof." So, too, the congressional policy as evidenced by the congressional acquiescence in the procurement practice of not paying state sales taxes and by the exemptions in federal excise statutes in favor of articles sold for the exclusive use of the United States or a state (*King & Boozer* brief, pp. 78-80) is equally persuasive here. Congress can hardly have intended an exemption from state sales taxes without a correlative exemption from compensating use taxes,⁴ particularly since the use tax is ordinarily collected directly from the consumer.

⁴ The compensatory character of the use tax involved in this case is apparent from the exemption contained in section

III

THE IMMUNITY OF THE UNITED STATES IS NOT LOST
WHEN IT STORES OR USES GOODS THROUGH A COST-
PLUS CONTRACTOR

We have shown that the Alabama use tax is imposed upon the user, and that the United States in storing and using goods is immune from such a tax. ~~There~~ remains to be considered only whether the immunity which would otherwise exist disappears when the United States acts in part through a cost-plus-a-fixed-fee contractor rather than through the regular procurement and operating branches of the Government.

The brief for the United States in *Alabama v. King & Boozer*, No. 602, this Term, develops in detail the general status of the cost-plus contractor (pp. 81-86), the terms of the contract (pp. 86-91), and the procurement practice of the parties (pp. 91-94). Here, as in that case (pp. 94-96), whatever characterization be applied to Dunn & Hodgson, the goods were used and stored on behalf of and by the United States and not the contractor.

The roofing material was shipped direct from the Certainteed Corporation, at Atlanta, Georgia, to the United States Constructing Quartermaster at

III (a) of the statute (*infra*, Appendix, p. 16), and has been maintained in an opinion of the Attorney General of Alabama, dated October 4, 1939 (Prentice-Hall, State and Local Tax Service, par. 23,065) and in a ruling of the State Department of Revenue of Alabama, dated October 24, 1940 (*Id.*, par. 23,072).

Fort McClellan (R. 65). During the interval Dunn & Hodgson had no possession of the goods in Alabama. The unloading from the railway car occurred at a siding, within the Fort, and the goods were directly stored in a warehouse belonging to the United States after Government checking and inspection (R. 66). The goods were removed from the warehouse only when they were needed in the construction work, and were then used in performance of the Dunn & Hodgson contract in building the tent camp for the Government (R. 66). From these events it seems clear that the storage and use were those of the United States. Dunn & Hodgson did not independently control the shipment of the roofing, and acted at all points of the acquisition under the supervision of the Contracting Officer through the Constructing Quartermaster; the contractor never owned the roofing and was not at liberty to dispose of it in any manner except as directed by the United States. On the other hand, the Government had full dominion, and could have put the property to any use it chose, at Fort McClellan or elsewhere. In short, the contractor served only as a means, employed for mechanical convenience, through which the United States effected the storage and use of the roofing material for its own purposes.

In this case, then, precisely as in the *King & Boozer* case, the realities of the transaction, the necessities of the Government's operation, and the applicable legal principles demonstrate that the

Alabama storage and use tax, as applied to the cost-plus contractor, is in reality imposed upon the Government and is, therefore, invalid (see *King & Boozer* brief, pp. 97-105). And there has been no more of a waiver by the United States of its immunity with respect to use and storage taxes collected through the cost-plus contractor than there has been with respect to the sales taxes (see *King & Boozer* brief, pp. 109-117).

CONCLUSION

The Alabama use tax is imposed on the user. The United States in storing and using tangible personal property is immune from a state use tax. The Government's immunity is not lost because it acts in part through a cost-plus-a-fixed-fee contractor. The Alabama use tax cannot, therefore, be imposed with respect to the goods acquired by the United States through Dunn & Hodgson, stored by the United States, and used by Dunn & Hodgson in the performance of its construction contract with the United States. It is accordingly respectfully submitted that the decision below should be affirmed.

✓ CHARLES FAHY,
✓ *Acting Solicitor General.*

✓ SAMUEL O. CLARK, Jr.,
✓ *Assistant Attorney General.*

✓ WARNER W. GARDNER,
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OCTOBER 1941.

APPENDIX

The Acts of June 13, 1940, 54 Stat. 350, 360-361, and of July 2, 1940, 54 Stat. 712, are reprinted in Appendix A of the Brief for the United States in *Alabama v. King & Boozer*, No. 602, this Term, pp. 119-121.

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

SECTION II. (a) An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use, or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. * * * Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *

SECTION III. EXEMPTIONS. The storage, use, or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed * * * by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use, or

other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. * * *

* * * * *

SECTION VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. * * * Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the department a return for the preceding quarterly period in such form as may be prescribed by the department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the

department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. * * *

Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath. * * *

* * * * *

SECTION IX. If any person neglects or refuses to make a return required to be made by this act, the department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon any information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent ($\frac{1}{2}$ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the department until paid. * * * Promptly thereafter the department shall give to such person written notice of such estimate, determination and penalty, * * *

* * * * *

SECTION XXIV. No injunction or writ of mandate, or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with interest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments here-

under. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

SECTION XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the department, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500) for each such offense. * * *

SECTION XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

SUPREME COURT OF THE UNITED STATES.

No. 602.—OCTOBER TERM, 1941.

State of Alabama, Petitioner, <div style="text-align: center;">vs.</div> King and Boozer, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, and United States of America.	}	On Writ of Certiorari to the Supreme Court of the State of Alabama.
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[November 10, 1941.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Respondents, King and Boozer, sold lumber on the order of "cost-plus-a-fixed-fee" contractors for use by the latter in constructing an army camp for the United States. The question for decision is whether the Alabama sales tax, with which the seller is chargeable, but which he is required to collect from the buyer, infringes any constitutional immunity of the United States from state taxation.

The Alabama statute, Act No. 18, General Acts of Alabama, 1939, expressly made applicable to sales of building materials to contractors, § I(j), lays a tax of 2 per cent on the gross retail sales price of tangible personal property. While in terms, § II, the tax is laid on the seller, who is denominated the "taxpayer", by § XXVI it is made the duty of the seller "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax."

Section VII provides that when sales are made on credit the tax is payable as and when the collection of the purchase price is made. The Supreme Court of Alabama has construed these provisions as imposing a legal obligation on the purchaser to pay the tax which the seller is required to add to his sales price and to collect from the purchaser upon collection of the price, whether the sale is for cash or on credit. See *Lone Star Cement Corp. v. State Tax Commission*, 234 Ala. 465; *Long v. Roberts*, 234 Ala. 570; *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360; *Wood Preserving Corp. v. State Tax Commission*, 179 So. 254. Section V excludes from the tax the proceeds of sales which the state is

prohibited from taxing by the Constitution or laws of the United States.

Respondents, King and Boozer, who furnished the lumber in question on the order of the contractors, appealed to the state circuit court from an assessment of the tax by the state department of revenue, on the ground that the tax is prohibited by the Constitution because laid upon the United States, and is excluded from the operation of the taxing statute by its terms. The United States was permitted to intervene and joined in these contentions.

The trial upon a stipulation of facts, embodying the relevant documents, resulted in a decree sustaining the tax which the Supreme Court of Alabama reversed, 3 So. (2d) 572. Apart from the constitutional restriction, it found no want of authority in the taxing statute for the collection of the tax from the contractors. But it concluded that although the contractors were indebted to the seller for the purchase price of the lumber, they were so related by their contract to the Government's undertaking to build a camp, and were so far acting for the Government in the accomplishment of the governmental purpose, that the tax was in effect "laid on a transaction by which the United States secures the things desired for governmental purposes", so as to infringe the constitutional immunity, citing *Panhandle Oil Co. v. Knox*, 277 U. S. 218; *Graves v. Texas Co.*, 298 U. S. 393. We granted certiorari, 314 U. S. —, the question being one of public importance.

Congress has declined to pass legislation immunizing from state taxation contractors under "cost-plus" contracts for the construction of governmental projects.¹ Consequently the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the national government. The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory

¹ See proposed Senate Amendment No. 120, to H. R. 8438, which became the Act of June 11, 1940, 54 Stat. 265; Cong. Rec., 76th Cong., 3rd Sess., Vol. 86, Part 7, pp. 7519-19, 7527-7535, 7648.

state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox*, *supra*; *Graves v. Texas Co.*, *supra*, we think it no longer tenable. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Trinityfarm Co. v. Grosjean*, 291 U. S. 466; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160; *Helvering v. Gerhardt*, 304 U. S. 405, 416; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466.

The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors who ordered the lumber and paid for it, but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract.

The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the "purchaser" liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. The Government's contention is that it has a constitutional immunity from state taxation

on its purchases and that this was sufficiently a Government purchase to come within the asserted immunity.

As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity. By the cost-plus contract the contractors undertook to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and to do all things necessary for the completion of" the specified work. In consideration of this the Government undertook to pay a fixed fee to the contractors and to reimburse them for specified expenses including their expenditures for all supplies and materials and "state or local taxes . . . which the contractor may be required on account of his contract to pay". The contract provided that the title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the Government "upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer". The Government reserved the right to furnish any and all materials necessary for completion of the work, to pay freight charges directly to common carriers and "to pay directly to the persons concerned all sums due from the Contractor for labor, materials or other charges". Upon termination of the contract by the Government it undertook to "assume and become liable for all obligations . . . that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract".

A section of the contract, designated as one of several "special requirements", stipulated that contractors should "reduce to writing every contract in excess of two thousand dollars (\$2,000) made by him for the purpose of the work hereunder for services, materials, supplies . . . ; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder". While this section refers to contracts in excess of \$2,000, we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, un-

less the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.

The course of business followed in the purchase of the lumber conformed in every material respect to the contract. King and Boozer submitted to the contractors in advance a proposal in writing to supply as ordered, at specified prices, all the lumber of certain description required for use in performing their contract with the Government. The contractors, after procuring approval by the contracting officer of the particular written order for lumber with which we are presently concerned, placed it with King and Boozer on January 17, 1941. It directed shipment to the Construction Quartermaster at the site "for account of" the contractors and stated "this purchase order does not bind, nor purport to bind, the United States Government or Government officers". King and Boozer thereupon shipped the lumber ordered by the contractors by contract trucks to the site as directed, where it was used in performance of the contract. The sellers delivered to the contractors the invoice of the lumber, stating that it was "sold to the United States Construction Quartermaster %" [for account of] the contractors.² The invoice was then approved by the Construction Quartermaster for payment; the contractors paid King and Boozer by their check the amount of the invoice and were later reimbursed by the Government for the cost of the lumber.

We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors

² The statement that the lumber was "sold" to the Construction Quartermaster appears to have been inadvertent. On the argument the Government conceded that this was not the usual practice. The invoices appearing of record in No. 603, *Curry v. United States*, issued to the same contractors for supplies ordered by them and delivered at the same site stated that the supplies were sold to the contractors.

in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

The Government, to support its thesis that it was the purchaser, insists that title to the lumber passed to the Government on shipment by the seller, and points to the very extensive control by the Government over all purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of \$500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser. The necessary corollary of its position is that the Government, if a purchaser within the taxing statute, became obligated to pay the purchase price.

But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421; *United States v. Driscoll*, 96 U. S. 421. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. *James v. Dravo Contracting Co.*, *supra*; *United States v. Driscoll*, *supra*.

We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the con-

tractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James v. Dravo Contracting Co.*, *supra*. See *Metcalf & Eddy v. Mitchell*, *supra*, 523, 524; *Trinityfarm Co. v. Grosjean*, *supra*, 472; *Helvering v. Gerhardt*, *supra*, 416; *Graves v. New York ex rel. O'Keefe*, *supra*, 483.

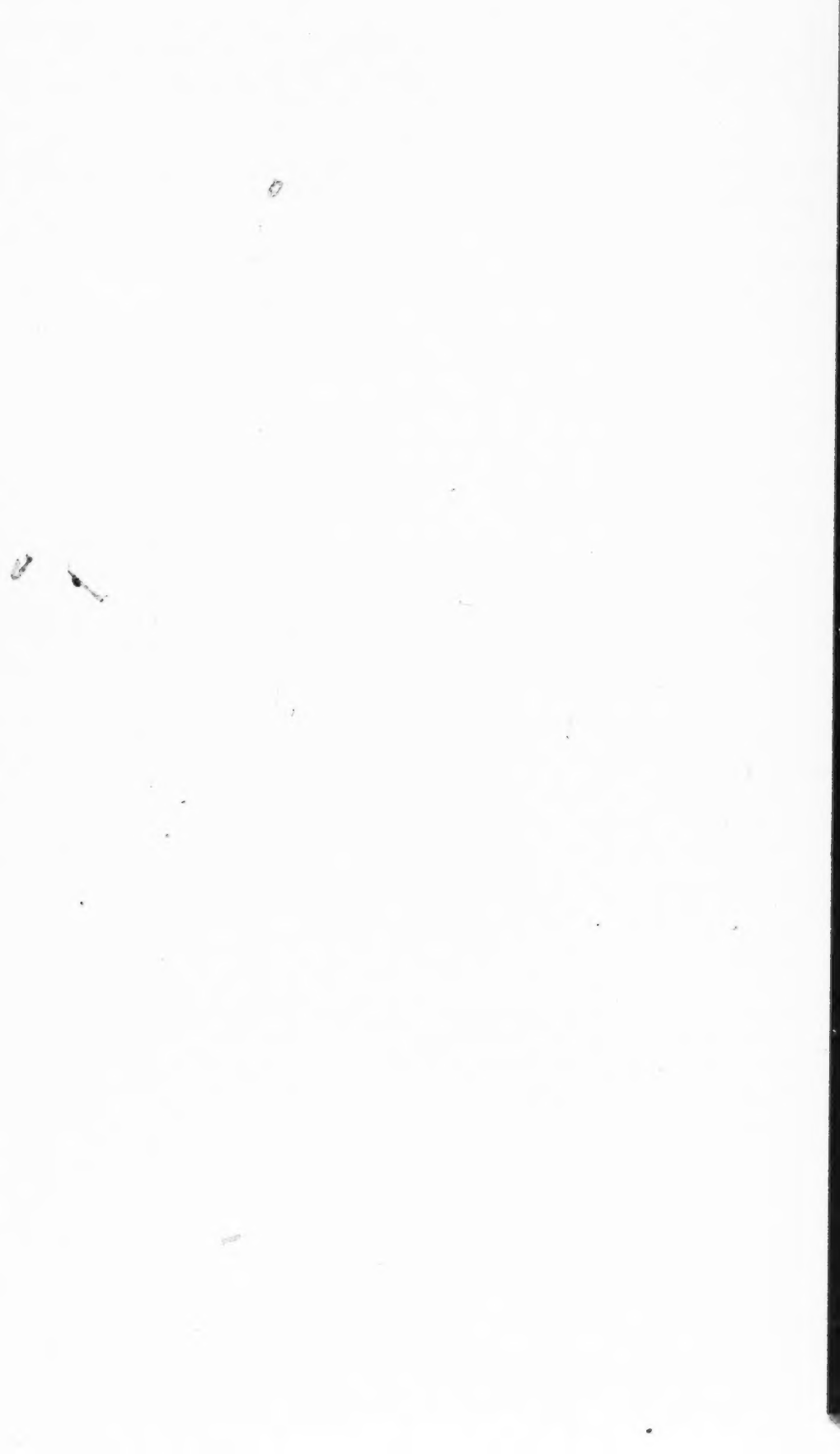
Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test :

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 603.—OCTOBER TERM, 1941.

John C. Curry, Individually and as
Commissioner of Revenue of the
State of Alabama, Petitioner,

vs.

The United States of America, Dunn
Construction Company, Inc., and
John S. Hodgson and Company,
Partners Doing Business as Dunn
Construction Company, Inc., and
John S. Hodgson and Company.

On Writ of Certiorari to
the Supreme Court of
the State of Alabama.

[November 10, 1941.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 602, *State of Alabama v. King and Boozer and the United States*, decided this day. It presents the question whether, the contractors, by the cost-plus contract involved in the *King and Boozer case*, who are respondents here, are immune from the use tax imposed by the Alabama statute, Act No. 67, General Acts of Alabama, 1939, because the materials with respect to the use of which the tax was laid, were ordered by the contractors and used by them in the performance of their contract with the Government.

Section II of the taxing act provides: "(a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, . . . (b) . . . Every person storing, using or otherwise consuming in this State, tangible personal property purchased at retail shall be liable for the tax imposed by this act . . ."

Section III exempts from the operation of the statute the storage, use or other consumption of property, the sale of which is taxed by other provisions of the statutes, and the storage, use

or consumption of property, taxation of which is prohibited by the Constitution or laws of the United States.

Petitioner, Commissioner of Revenue for the State, assessed and collected from the contractors a tax on their use or consumption, within the state, of a quantity of roofing which they purchased outside the state and caused to be shipped to the camp site within the state, where they used it in the performance of their construction contract with the Government. The present suit was brought by the United States and the contractors in the state circuit court against petitioner, individually and as Commissioner, for a declaratory judgment determining the tax liability of the contractors and for a decree ordering refund of the tax paid by the contractors. The lawfulness of the tax was challenged specifically on the ground that the plaintiffs, respondents here, are exempt from the tax by the provisions of the state statute and are immune from it, because the use and consumption of the roofing by the contractors as agents or instrumentalities of the United States is constitutionally immune from taxation.

The circuit court sustained the tax, declaring that it was laid upon the contractors by the statute and that they were not constitutionally immune from the tax because of their use of the purchased property in performance of their contract with the United States. The Supreme Court of Alabama reversed, 3 So. (2d) 582, holding that the tax infringed the constitutional immunity of the United States, for reasons stated in its opinion in *King and Boozer v. State of Alabama*, 3 So. (2d) 572. We granted certiorari, 314 U. S. —, so that we might consider this with the *King and Boozer* case.

Since the Supreme Court of Alabama rested its decision on the constitutional ground and not upon the inapplicability of the taxing statute to the contractors, we assume for present purposes, as we take it the state court assumed, that the contractors are subject to the tax but for the asserted Government immunity, and that upon the correct interpretation of the Alabama statute they would have been subject to the tax if their cost-plus contract had been with a private individual. Cf. *Felt & Tarrant Co. v. Gallagher*, 366 U. S. 62; *Southern Pacific Co. v. Gallagher*, 306 U. S. 167; *Department of Treasury v. Wood Corp.*, 313 U. S. 62.

For the reasons stated at length in our opinion in the *King and Boozer* case we think that the contractors, in purchasing and

bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the *King and Boozer* case, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government.

Upon the record as it comes to us we are not called upon to determine whether the taxing statute is applicable to transactions of the contractors on the camp site, a government reservation. We decide only the question passed upon by the Supreme Court of Alabama, that if the statute is applicable to and taxes the contractors upon a cost-plus contract like the present, if entered into with a private person, they are not immune from the tax when, as here, the contract is with the Government.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

ing day must be duly approved and properly recorded. No arrears shall be allowed to accumulate.

47. He shall see that his department is economically administered having regard for the urgency of the work and that due care is exercised in the handling of Government property entrusted to him.

48. All accountability papers must be signed by the Constructing Quartermaster or the property officer if other than the Constructing Quartermaster is so designated or a commissioned assistant designated by him.

49. The Field Auditor must instruct all members of his staff that their work is entirely confidential and no information is to be disclosed by any one to anybody except through official channels.

Field Auditor's Staff:

50. The basis for the organization of the Field Auditor's office shall be seven (7) general departments as follows:

Department	Head	Principal Duties
1. Fiscal	Chief Fiscal Auditor	Money Accountability
2. Materials	Chief Material Inspector	Receiving, Inspection and Delivery of Materials.
3. Labor	Chief Time Inspector	Supervising Time and Payrolls
4. Transportation	Chief Transportation Inspector	Handling Traffic and Claims
5. Tools and Equipment	Chief Equipment and Tool Inspector	Contract Property and Rentals.
6. Commissary	Chief Commissary Auditor	Supervising Commissary
7. Administrative	Administrative Assistant	Mail, Filing, Personnel General

51. Attached to this manual is an organization chart showing the departmental relations in the Constructing Quartermaster's Office in a general way. Two or more departments shall be combined under one head whenever conditions warrant it.

[fol. 99] 52. The Field Auditor shall furnish the Engineering Department of the Constructing Quartermaster with such cost data from financial records as shall be required. The cost analysis shall not, however, be in his charge but shall be prepared by the Cost Accounting Section of the Engineering Department.

53. Each and every employee of the Field Auditor's staff is obliged to carry out the instructions of the Field Auditor

to the fullest extent in whatever department his services may be required.

54. The heads of the Departments shall be furnished, by the Field Auditor, with copies of this guide, general instructions to Constructing Quartermasters and, where necessary, all contracts and sub-contracts.

Fiscal Department:

55. The Fiscal Department shall be in charge of the Chief Fiscal Auditor, who shall act in general supervision, under the Field Auditor, of all of the departments. In the absence of the Field Auditor, the Chief Fiscal Auditor will act for him in directing the operations of his staff. His principal duties include the following:

1. Final audit of all invoices, payrolls, etc.
2. Maintaining controlling account for Invoice Register.
3. Recording vouchers.
4. Maintaining record showing status of funds.
5. Maintaining liability record.
6. Preparation of financial reports.

56. The Chief Fiscal Auditor receives checked invoices from the Materials, Commissary and Tool Departments with the supporting papers and checked payrolls from the Labor Department with receipts attached.

57. He makes a detailed audit of all papers and checks the distribution. A file showing the approved signatures of all persons authorized to pass on vouchers, shall be kept for reference.

58. After having audited the papers, the Chief Fiscal Auditor will place his signature on the original and duplicate copies of the invoices and payrolls.

Materials Department:

59. The Materials Department is administered under the supervision of the Chief Materials Inspector.

60. The principal duties of this department may be [fol. 100] grouped under five sub-divisions, as follows:

Branch	Head	Principal Duties
(a) Purchase Order	Order Clerk	Checking prices and recording of orders.
(b) Receiving and stores	Chief Receiving Clerk	Checking quantities received and supervising stores.
(c) Inspection	Chief Inspector	Inspecting quality
(d) Invoice	Invoice Clerk	Recording and checking invoices and maintaining statistical record of expendable materials.
(e) Property	Property Record Clerk	Maintaining property records.

Labor Department:

61. It is the policy of the Construction Division that the contractor shall keep all time and prepare all payrolls, the Field Auditor maintaining an independent check of the time and auditing the payrolls. The time keeping system must be adapted to the particular requirements of the project.

62. The Labor Department shall have entire supervision of all labor accounting including the checking of time and payment of wages.

63. This department shall be in charge of the Chief Time Inspector whose principal duties are as follows:

- a. To maintain a record of employees.
- b. To make an independent check of the time of employees.
- c. To audit payrolls.
- d. To verify wages paid employees and to witness payment thereof.
- e. To check receipts for wages with payrolls in order to determine the amount to which the contractor is entitled for reimbursement.
- f. To maintain continuous record of unclaimed wages.
- g. To supervise team accounting in the same manner as labor accounting.

Traffic Department:

64. The Traffic Department is administered under the supervision of the Chief Transportation Inspector. The duties of the Traffic Department include the following:

- a. Maintaining Traffic Records of all shipments received.

b. Preparing bills of lading for accomplishment by proper officer and maintaining record thereof.

c. Keeping in touch with downtown freight yards and depots, appointing special representative if necessary and notifying Materials Department in advance of arrival of freight.

d. Maintaining record of all demurrage and the reason for the accruing of the charge.

[fol. 101] e. Preparing claims against carriers.

Equipment and Tools Department:

65. The Equipment and Tools Department, dealing with the purchase and rental of all tools and equipment, shall be in charge of the Chief Equipment and Tools Inspector.

66. The duties of the Chief Equipment and Tools Inspector with respect to purchase of tools and equipment shall include the following:

a. To inspect all tools and equipment when brought on the work, and to see that they are in sound and workable condition.

b. To secure memorandum receipts for all non-expendable material for which the contractor is reimbursed.

c. To keep a close watch on the contractor's tool house and supervise methods of handling tools in order that wastage and loss may be reduced to a minimum.

67. The memorandum receipts for tools and equipment used by the contractor, whether signed by him or not, shall be held as a charge against the contractor until the completion of the work pending final settlement.

68. The contractor must properly safeguard the handling of tools. Where possible all tools should be passed through a general tool house and receipts taken from the men or sub-foreman as they are issued. It will be necessary for the contractor to maintain a file showing signatures of his foreman and sub-foreman for reference.

Commissary Department:

69. The Commissary Department is administered under the supervision of the Chief Commissary Auditor.

70. The standard form of contract provides that the cost of all commissary operating personnel and supplies will be borne by the Contractor and that all commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Constructing Quartermaster may prescribe.

71. It will be the duty of the Chief Commissary Auditor to audit commissary expenses and receipts for the purpose of determining that the provisions of the contract are properly carried out by the Contractor.

Administrative Department:

72. The Administrative Department shall be in charge [fol. 102] of the Administrative Assistant.

73. His particular duties shall include direct charge of the following:

- a. Personnel.
- b. Mail, telegrams, etc.
- c. Files.
- d. Supplies.
- e. General.

74. The Administrative Assistant shall see that all documents and reports from the various departments, and also from the contractor, are properly and promptly forwarded to the Field Auditor.

75. He shall keep a daily record of time of all employees on the Field Auditor's staff and shall have charge of the payroll. He must familiarize himself with the Government regulations in respect to civilian employees and see that all records are kept and payments made in accordance with existing instructions and regulations.

76. If so directed by the C. Q. M. the Administrative Department of the Field Auditors office may act as the Administrative Dept. for the entire office of C. Q. M.

77. Copy of Instructions to Contractors relating to accounting and auditing procedure under Cost-Plus-A-Fixed Fee Contracts immediately follows:

"Instructions to Contractors Relating to Accounting and Auditing Procedures Under Cost-Plus-A-Fixed-Fee Contracts."

General

1. The Constructing Quartermaster (C. Q. M.) in charge of the project controls the accounting methods and procedures under fixed-fee contracts through an auditing staff, headed by a Field Auditor, organized, generally, as follows:

Field Auditor

Department	In Charge of
Fiscal	Chief Fiscal Auditor
Materials	Chief Materials Inspector
Labor	Chief Time Inspector
Transportation	Chief Transportation Inspector
Tools and Equipment	Chief Tools and Equipment Inspector
[fol. 103] Commissary Administration	Chief Commissary Auditor Principal Clerk

2. The contractor will carefully observe the provisions of the contract respecting accountability and the related laws and Governmental regulations. Full cooperation will insure prompt reimbursement for expenditures. The Field Auditor makes a detailed pre-audit of all costs and expenses incurred—prior to payment thereof by the contractor insofar as this is practicable. Upon receipt of the contractor's vouchers for reimbursement, verification will be readily possible by the Field Auditor. Thereupon the verified voucher will promptly be submitted to the C. Q. M. for his approval and certification to the Finance Officer for payment.

3. Essential general requirements that must be observed by the contractor are: (a) Make no commitment without subjection to the approval of the C. Q. M. (in advance if so required); (b) Support all vouchers for reimbursement with original invoices or original payrolls accompanied by original receipts from vendors or employees.

4. The Contractor's office procedure and accounting system will presumably be found adaptable to Government requirements. The Field Auditor will see to it that the practices are in line therewith.

DETAILED INSTRUCTIONS

1. Purchases of Materials, Equipment, Etc.
 - a. 3 bids required (where sources are available).

b. Purchase orders are subject to approval of the C. Q. M. See attached specimen form for instructions, copies required, etc.

c. Receipts of materials, etc. are to be checked and inspected by the C. Q. M. upon delivery.

d. Vendors' invoices—original (receipted) and three copies are required by C. Q. M.

e. Vendors' receipts are required on original invoices. In case of more than one invoice from a vendor, summary statement may be receipted.

2. Employees—Wage Rates, Time and Payroll

a. Wage rates are fixed by schedule determined by Labor Department.

b. Salaried employees' compensation shall be on basis of preceding year unless increase is approved by the C. Q. M.

c. All-employees are to be hired subject to approval of [fol. 104] the C. Q. M. Personal history of each employee is to be on record.

d. Employees are to be checked in and out each day by the C. Q. M. and each morning and afternoon on the job.

e. Payroll deductions are limited to Social Security taxes and State taxes.

f. Payroll. Original (supporting reimbursement voucher) and three copies are required by C. Q. M.

g. Payment of wages must be witnessed by representative of C. Q. M.

h. Receipt for wages is required from each employee.

3. Rental of Equipment

a. Rental rates will be predetermined by the C. Q. M.

b. Rental contracts shall be subject to approval by the C. Q. M.

c. Valuation of rented equipment shall be subject to approval of the C. Q. M.

d. Title to rented equipment shall vest in the Government when total rental paid equals valuation (an additional 1% per month to be paid by the Government).

e. Rental equipment shall be in sound and workable condition.

f. Time of rental shall be verified currently by the C. Q. M.

g. Payment of rental shall be made monthly.

h. Receipts for rental shall be obtained from owner of equipment.

4. Transportation Charges On Materials and Equipment.

a. All transportation charges shall be verified and approved by the C. Q. M.

b. Original receipted freight or trucking bills shall accompany reimbursement voucher.

5. Traveling Expenses

a. All traveling expenses are subject to the approval of the C. Q. M.

b. Advance written approval of the C. Q. M. is required in particular respect to (1) transportation and traveling expenses to and from the work of the field forces, and (2) traveling and hotel expenses of officers, engineers and other employees of the contractor.

c. Travel expenses and subsistence shall conform to the allowances authorized by the "Standardized Government Travel Regulations", unless otherwise authorized by the C. Q. M.

d. Receipts from recipients of travel expense shall be required in each case.

[fol. 105] 6. Cash Discounts, etc.—The Contractor shall take advantage of all discounts and allowances.

7. Fixed Fee—Ninety per cent (90%) of the fixed fee shall be paid as it accrues in monthly installments based upon the percentage of completion of the work. The unpaid balance shall be paid upon final acceptance of the work.

8. Records—All records shall be preserved by the contractor for three years after completion of the work.

9. Bonds—The contractor shall furnish such bonds as may be required.

10. Contractor's Organization—The contractor shall furnish the organization charts and statements of procedure called for by the C. Q. M.

Office of the Quartermaster General
Chart of the Office of the Construction Division

Chief of Construction Division Executive Office		
Liaison Branch		Funds & Estimates Branch
Administration Branch	Construction Branch (Lump-Sum Contracts)	Accounting & Auditing Branch
Engineering Branch	(W.P.A. & P. and H. Work)	
Construction Branch (Fixed-Fee Contracts)	Legal Branch	Repairs & Utilities Branch
	Procurement & Expediting Branch	Real Estate Branch

[fol. 106]

Organization Chart

Office of the Constructing Quartermaster
For Work Under Fixed Fee Contracts Only

S C Q M
C Q M
Comm. Off.

Field Aud. See Cht. "A" (Civilian)	Property Off. Comm. Off.	Executive Officer Comm. Off.	Ton. Officer (See Cht A) Comm. Off.	Safety Engr. Fire Marshal & Sanit. Off. Comm. Off.	Chief Clerk (Civilian)
Supervision of Engineering by Government Check on Arch. and Engr. Plans and Serve in an Advisory Capacity as Directed by the C. Q. M. Necessary Com- missioned Off's. & Civilian Engrs as needed.	Architectural of Engineering Contractor For The Architectural and Engineering Design of Project including Supervision & Inspection During Constn. Forces as decided With The CQM	Construction Contractor For The Construction of the Project Furnishes all Labor, Material and Equipment as provided in Contract Force as decided With the CQM	Supervision of Construction by Government Check on Const. Operations	Necessary Comm. Officers and Civilian Assistants	Personnel Mail and Records Reports Statistics Files Stenogs. & Messengers

NOTE: This chart is functional only and may be changed to suit local conditions. It must be understood that on a Fixed Fee Project the Fixed Fee Architectural or Engineering Contractors will do all the Architectural, Engineering and Inspection work and this Word should not be duplicated by the C. Q. M. Maximum use will be made of Officers in a Supervising Capacity. The American Railroad Association, Public Roads Administration under Federal Works Agency, and the National Board of Fire Underwriters may be requested to furnish representatives if needed.

[fol. 107]

Chart of Field Auditor's Organization
Constructing Quartermaster
Field Auditor

Fiscal									
Chf Fis Aud									
Materials	Labor	Traffic		Tools & Eqpt	Commis-	Administ	r've		
Chf. Mat'ls.	Chief Time	Chief	Funds	Chief Eqpt	sary Chf	Administ	r've		
Inspector	Inspector	Transp		& Tools Insp	Com'ary	Assistant			
Orders	Employee's	Traffic	Liability	Contract	Auditor		Personnel		
Order Clk	Records		Records	Property					
	Record Clk								
Invoices	Time	Claims	Status	Rentals		Mail			
Invoice Clk	Time Chkrs		of Funds						
Recording	Pay Roll		Vouching			Filing			
	Pay Roll Clk								
Receiving	Payment of		Auditing			Supplies			
Rec'vg Clk	Wages								
	Payment Clk								
Receiving			Record'g			General			
Storing			Costs						
Issuing			Reports						
Inspecting			Statistics						
Inspector									
Property		Equipment	Labor	Revenue	Operating				
Records		& Supplies			Results				
Mess Houses and Stores									
Prices	Invoices	Warehousing	Time	Payroll	Cash	Payroll	Receipts	Profit	
						Deduct-	& Expend-	or Loss	
						ions	itures		

[fol. 108]

EXHIBIT "B"

**War Department, Office of the Quartermaster General,
 Washington**

In Reply Refer to QM 300.5. (Fixed Fee Letter No. 5).

**Subject: Relations Between Constructing Quartermaster
 and Contractor on Cost-Plus-A-Fixed-Fee Contracts.**

To: The Constructing Quartermaster:

1. Considerable difficulty has arisen in the field due to the lack of understanding on the part of the Constructing Quartermaster in regard to his relations with the contractor who has been selected by this office to perform the work. Constructing Quartermasters should bear in mind at all times that construction being carried out under cost-plus-a-fixed-fee contract is in the nature of a co-adventure between the contractor and the Government. The Constructing Quartermaster's principal function comprises general su-

pervision of the contractor's operations and to see that Government interests are protected, and not to furnish technical supervision and directions for the contractor's work. Both the engineering and construction contractors have been paid a fair fee for doing their respective parts of the work and they should be given a free hand in doing these operations, insofar as they are consistent with good practice, and an accurate accounting is kept of all expenditures.

2. Your particular attention is invited to letter of this office, 300.5 Fixed Fee Letter No. 1—Subject: Directive and Instructions on Cost-Plus-A-Fixed-Fee Contracts, C. B. F. F. General Field Letter No. 1, paragraph 3, it is felt that this gives you a clear definition of what is expected of you. In cases of borderline decisions between what you think is correct and the contractor's judgment based on his past experience of what he feels is the proper procedure, there should be a tendency to go the contractor's way so long as fundamental laws are not violated and the Government's interests are protected. In certain remote localities the actual securing of a number of bids on small purchases of one thousand dollars or less is frequently a hardship and costs more in telephone tolls and administrative expense than the savings involved and more seriously the securing of such a number of bids requires waste of valuable time. For such small purchases the contractor should be permitted to make the purchase in his customary manner at what you and his purchasing agent consider to be a fair market price. On many occasions it will only be possible to get one quotation and if such quotation is satisfactory on [fol. 109] its face and appeared to be a just price, you should not hesitate in permitting the contractor to make these purchases in order that the progress of the work will not be delayed.

3. The only restriction that has been placed upon the salary of contractors' employees is that no employee receiving in excess of \$9,000 per year will have his salary reimbursed by the Government. Salaries below that figure are subject to your approval and need not be submitted to this office for final approval. In this we rely on you to use your best judgment in determining whether or not the man employed has a record in the past that will justify the

salary to be given. It should be borne in mind that to complete these projects in the time required, a high calibre type of personnel must be employed by the contractor and in order to secure that type of personnel the contractor must of necessity pay a substantial salary at all times somewhat in excess of what the person has been accustomed to receiving, due to the employee having to leave his home and set up a new residence or maintain a double establishment for a very short period of time, and furthermore, it should be recognized that certain men during the past few years have worked at salaries below their normal capacity due to the scarcity of jobs which they are qualified to fill.

4. It has been noted that in some cases the Constructing Quartermasters have been requiring their contractors to take out certain forms of fire insurance. Subject to your approval this insurance is a matter for the contractor to decide on, so long as the property is in his possession and has not yet become the property of the Government but as soon as such property arrives at the site and is checked in by your inspecting staff and actually becomes the property of the Government, there is no need for fire insurance inasmuch as the Government has always been a self-insurer and, due to the volume of material handled by the Government, it has not been found economical to insure its own property. Extreme care, however, must be taken to guard against loss by fire and mechanical fire extinguishers, fire barrels, etc., must be liberally distributed over the job and alert watchmen maintained at all times to guard against fire. This office will recognize requisitions for fire fighting equipment to be sent to projects whenever the Constructing Quartermaster feels that it is required in connection with his work.

5. It being wholly impossible to foresee and enumerate in the contracts all of the items of materials, services, and labor (which terms are all inclusive) to be furnished or provided [fol. 110] by the contractors, the contracts enumerate only the major items specifically required by the contracts and certain other items which could be foreseen as likely to enter into the operations under the contracts. The contracts, therefore, provide that the term "actual net cost" shall include specifically but not exclusively the items enumerated. Inevitably many unforeseen items of cost arise during the

progress of the work of the character and magnitude of that covered by these contracts.

6. The present authorization for the use of cost-plus-a-fixed-fee contracts was justified by the very unusual construction program involved in the development of outlying posts where there are no ready contacts with labor and material markets, where the working conditions are hazardous, and the time element was of serious moment. The speedy and certain accomplishments of the projects covered by the contracts was and is considered by those bearing the burden of responsibility for the national defense as of the utmost importance. The contractors selected to cooperate with the Government and contribute their resources, experience, and skill toward the accomplishment of the projects, include in their organizations men of unquestionable integrity and patriotism. Their success in the commercial world establishes their abilities. Their judgment along the lines of their qualifications is entitled to the highest of faith and credit. The monetary compensation they will receive is comparatively modest as indicated by the fees allowed. The general intent of the special legislation, the negotiations thereunder, and the contracts is clearly that the contractors shall be made whole for their out-of-pocket expenditures for the benefit of the work under the contracts, as may be approved or ratified by the contracting officer, acting under the direction of the Secretary of War. Any action which conforms to such general intent is entitled to approval.

For the Quartermaster General.

E. E. Kirkpatrick, Captain, Q. M. C., Assistant.

40/1600.

[fol. 111] [Stamp:] Received Feb. 24, 1941. C. Q. M., Fort
McClellan, Alabama

EXHIBIT "C"

War Department

Office of the Quartermaster General
Washington

In Reply Refer to QM 300.5 C-C.

February 19, 1941.

Construction Division Letter No. 101

Subject: Responsibility of Local Constructing Quartermasters and Relationship with Architect-Engineers and Construction Contractors on Projects

To All Zone Constructing Quartermasters, All Local Constructing Quartermasters, All Architect-Engineers (through local C. Q. M.), All Construction Contractors (through C. Q. M.):

1. The local Constructing Quartermaster is the official in responsible charge of the project to which he is assigned. He is the authorized representative of the Government on the project. He will discharge his duties under the direction and supervision of the Quartermaster General through the orders and instructions of the Chief of the Construction Division and the Zone Constructing Quartermaster of the Zone in which his project is located. In the absence of the local Constructing Quartermaster the next senior assistant Constructing Quartermaster will function in his stead unless otherwise arranged by the Zone Constructing Quartermaster.

2. The Architect-Engineers and the Construction Contractors on the project together with the military and civilian assistants assigned for duty with the local Constructing Quartermaster will report to and are responsible to the local Constructing Quartermaster as the authorized representatives of the Government in charge of the project.

However, nothing is contemplated in the operations of the project which relieves the Architect-Engineer and the Contractor of their responsibility to the Government for

sound and economical fulfillment of their contractual and professional obligations.

3. The Local Constructing Quartermaster will:

a. Insure compliance with terms of contracts.

b. Assure correctness of expenditures.

[fol. 112] c. Serve as a liaison officer for the Architect-Engineer and for the Construction Contractor in all phases of government operations.

d. Obtain full information as to Government Requirements so as to facilitate the work of the Architect-Engineer and the Construction Contractor.

e. Negotiate contractual arrangements involving sewage disposal with municipalities, right-of-way with adjoining property owners, railroad spurs and the like, subject to the advice and such approval as is necessary by the office of the Quartermaster General. In this the local Constructing Quartermaster may use the services of the Architect-Engineer or the Contractor.

f. Approve or secure approval of sub-contracts submitted by the Construction Contractor or the Architect-Engineer.

g. Promptly transmit instructions and information to the Architect-Engineer and the Construction Contractor received from the office of the Quartermaster General in Washington.

h. Act or secure action promptly on all requests or recommendations of the Architect-Engineer or of the Construction Contractor.

i. Exercise overall supervision of the project to insure that all phases of it are being soundly coordinated.

4. The Architect-Engineer, under the direction of the Local Constructing Quartermaster, will:

a. Insure that the project requirements are met in accordance with sound design and construction practice, including the overall project layout, as well as the design and arrangement of specific structures and utilities. Standard Army structures will be employed unless the Architect-Engineer's review of the plans indicates a practice that he deems unsuitable, in which case he will make suitable recom-

mendations, with reasons therefor, to the local Constructing Quartermaster.

b. Insure that construction conforms with design, and make or require to be made such tests and inspections as may be necessary to determine quality and conformity with plans and specifications.

c. Prepare a sound estimate of overall cost and the [fol. 113] costs of the major parts of the project, including such breakdown as may be required by the local Constructing Quartermaster.

d. Prepare, in conjunction with the Construction Contractor, job progress schedules.

e. Report on and make recommendations as to the relationship of actual progress and scheduled progress, and actual costs and estimated costs.

f. Perform such other duties as directed by the local Constructing Quartermaster.

5. The Construction Contractor, under the direction of the local Constructing Quartermaster, will:

a. Conduct, in an efficient manner, all phases of the construction work. Important in this is a prompt and comprehensive organization set-up to insure effective job planning, forward-looking handling in the employment of labor, including wages, conditions of work, safety, food, housing and transportation; procurement of materials and methods to facilitate storage, distribution and fabrication in the field at the location desired; procurement of good construction equipment. In the procurement of materials, there is involved the responsibility to take such steps as are necessary to insure delivery of materials where the initial procurement steps have been taken by Government agencies; lumber, heaters, and boilers for hospital units are examples.

b. Advise the Architect-Engineer in the preparation of a sound estimate of overall cost, and a breakdown of the cost of the larger parts of the project; concur in such estimates or make notation of exceptions; advise Architect-Engineer when any revision of estimates becomes necessary; install adequate cost control procedures.

c. Prepare, in conjunction with the Architect-Engineer, job progress schedules; advise Architect-Engineer when

any changes become necessary; install adequate progress control procedures.

d. Maintain such cost data as is required by the Government.

6. On projects, such as Ordnance Manufacturing Plants, a Design-Consultant may be employed to insure that the plant is of sound design and such as to best meet the operating conditions imposed by the Using Service for which the plant is being constructed. Close cooperation between the Using Service, the Design-Consultant, the Architect-Engineer, the Construction Contractor, and the local Constructing Quartermaster is therefore of paramount importance in order to insure the construction of a plant with satisfactory operating characteristics.

The Using Service is the service for which the plant is being constructed and is the service which will be responsible for the operation of the plant. Its position is analogous to that of a client in private construction practice. The local Commanding Officer of such plant is the representative of the Using Service on the ground and is responsible that the needs of that Service are fully considered at all times.

The needs of the Using Service will be communicated to and carried out on the project through the local Constructing Quartermaster, unless they contravene standing orders, existing policy, are extravagant or contrary to sound engineering practice. In such cases the matter will be referred at once to the Zone Constructing Quartermaster.

7. On projects at troop stations, as distinct from manufacturing plants, the Local Constructing Quartermaster is not authorized to undertake any program changes desired by local authorities unless and until such changes are concurred in by the Zone Constructing Quartermaster and approved by this office.

8. All previous instructions at variance with the provisions of this letter are hereby rescinded.

For The Quartermaster General:

Brehon Somervell, Brigadier General, U. S. A., Assistant.

Distribution List:

12 Copies to Each Zone Constructing Quartermaster.

5 Copies to Each Constructing Quartermaster.

Copies to all Branches, Control Section and Public Relations Section, Construction Division, War Department and Bureaus Concerned.

[fol. 115]

EXHIBIT "D"

Conference Held with Dunn Construction Company and John S. Hodgson and Company

Conference held in Room 2241, Munitions Building, Washington D. C. September 6, 1940, with Mr. W. R. J. Dunn of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of the John S. Hodgson & Company of Birmingham, Alabama, representing the Contractor: and Lt. Colonel E. G. Thomas, Mr. H. W. Loving and Mr. F. J. O'Brien, representing the Government relative to construction of Camp McClellan, Alabama, with Mr. Loving presiding.

Mr. Loving: Mr. Dunn, as I advised you this afternoon, you and Mr. Hodgson have been recommended by the Construction Advisory Branch for consideration in connection with the construction of the permanent tent camp to be built at Camp McClellan, Alabama. I showed you a description and estimate of cost of the work to be done which consists of utilities estimated to cost approximately \$796,700 and temporary buildings of various kinds estimated to cost \$2,674,250, which with certain tents for troops which are displaced by the hospital, will make a total project cost including overhead, engineering and contingencies of approximately \$3,702,935. Based on the best information available at this time we estimate that the net construction cost plus the contemplated fee to be paid the contractor totals \$3,335,977. As I advised you further, time is vitally important in this particular instance as it is desired if humanly and physically possible, to complete this project by October 15th. Practically all of the plans are complete. However, it will be necessary for the Government to retain private engineers to make certain surveys locally, to develop a topographic map to design the utilities, to place these standard buildings to be constructed on the definite site. It is contemplated that this engineer be employed immediately and that the necessary engineering work to be done without delay. Further, that construction parallel the engineering work and completion of plans as closely as

possible. From your questionnaire I note that the combined annual volume of work done by the Dunn Construction Company and John S. Hodgson & Company, has averaged about \$3,000,000 in recent years. I would like to ask what volume of work both of you have under construction at this time, or under contract?

Mr. Dunn: The two companies have today between \$100,000 and \$125,000 of uncompleted work on hand.

[fol. 116] Mr. Loving: You, therefore, then based on your statement of average volume, are in a position insofar as finances, personnel and equipment are concerned to undertake approximately \$3,000,000 work at this time. Is that correct?

Mr. Dunn: At least that much or more.

Mr. Loving: Do you contemplate, if awarded contract for construction of the work at Camp McClellan, to continue active in the competitive market?

Mr. Dunn: Except for exceptional isolated cases, in dealing with old customers, where the volume is small, we do not expect to continue in the competitive field.

Mr. Loving: Considering the time element, it is anticipated that it will be necessary for the members of both organizations to devote practically their entire time toward planning, organizing, purchasing and directing the construction of this project in order to complete the project within the desired time. If awarded the contract may we count on the cooperation and direction of you two gentlemen as principals, and your other key men except in the instances to which you refer?

Mr. Dunn: Yes, Sir.

Mr. Loving: For your information, Mr. Dunn, there is a feeling in certain quarters that there are few men in the South, possessing the necessary experience, organization, energy, vision and initiative required to handle a project of this character. Personally I do not share this belief and do not consider the fact that a successful contractor has not actually executed contracts of like volume as definitely proving that he cannot if he devotes his time, attention and organizing ability to it, organize to handle a job of this magnitude. If you are retained to handle this job I feel to a large extent that the honor and pride of the State of Alabama will be largely at stake. The Government has selected Fort McClellan as a site for an important camp and I feel

that you as principals of these two contracting firms and others who have pride in accomplishment of the citizens of Alabama, could do nothing better than to put their shoulders to the wheel, cooperate to the fullest extent, to show the War Department and critics from other sections that you, as contractors, the suppliers of labor, materials and equipment in Alabama, can accomplish results as efficiently and as economically as anyone else from any other part of the country. Mr. Dunn, as a result of work that you did under the direction of my old engineering firm and my personal knowledge of your business capacity and general standing in your community. I am assuming the responsibility of [fol. 117] offering to you and Mr. Hodgson the job of undertaking the construction of this project at Camp McClellan, believing that you will take a personal pride in this project, and having faith that I will never have cause to regret having recommended you, a Southern contractor, to undertake this project. In order to expedite the delivery of lumber, heaters, pipe and other standard articles of materials required for the project we are now having made a complete material take-off and as soon as this information is available, it is contemplated that the Government, through Procurement Branch, will enter the market and attempt to locate and secure firm quotations for these materials. It is contemplated that if satisfactory prices can be secured, definite orders for all of the lumber will be placed and instructions for shipment and delivery will be made without delay. As I informed you, it is estimated that approximately \$3,778,000 will be required for the construction of the project and the payment of engineering, overhead and supervision expenses. At present there is actually available \$400,000 leaving a deficit as of today of approximately \$3,378,885 which deficit it is anticipated the Congress will cover by making additional appropriations available for this work. It is contemplated that a contract be prepared and executed to cover the entire work planned but it will be necessary to include in the agreement, a provision to the effect that if additional funds are not made available by the Congress that expenditures incurred by you shall not exceed \$400,000. This means that it will be necessary for us to review and check the plans for the project and to select certain utilities and certain structures to be constructed which can be built within the funds now available. It is my understanding that you consider you are equipped and prepared to handle the

construction of all items of work with your own forces except inside electrical work, plumbing and heating, and possibly the outside electric distribution system. Is that correct?

Mr. Dunn: Yes Sir. From what we have seen, from what we know about the project now, we think that is the case.

Mr. Loving: I may state that the project embraces certain relatively simple building projects and certain simple utilities, such as water and sewer plants, roads, railroads, telephone and electric distribution systems.

Mr. Dunn: The only parts of the work that we contemplate subletting are such parts as time and money would be saved by subcontracts.

[fol. 118] Mr. Loving: We recognize, Mr. Dunn, that but few, if any, general contractors are fully equipped and manned to undertake every phase of building construction. We recognize that it is customary for the average general contractor to sub-let inside electrical plumbing and heating and similar mechanical work. According to the best estimate we are able to prepare at this time to estimate the net construction cost exclusive of overhead, engineering and fixed fee to be paid the general contractor at \$3,304,588 and based on a schedule of fixed fees, which is being paid on all of these projects of like character, we estimate it is worth a fixed fee to the Government, to have this work performed for \$128,865. I would like to ask if such a fee would be entirely satisfactory and acceptable to you gentlemen?

Mr. Dunn: We are delighted to do this work at the fee which you have set up as compensation for same.

Mr. Loving: While we do not anticipate that this Camp will not be built in its entirety, yet I want it clearly understood that there is only \$400,000 available at this time and if for unexpected reasons only \$400,000 is spent, the fee to be paid you will be paid pro-rata on the same basis as the fee applying to the entire project. The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs and in case only \$400,000 is spent, then in settling with you we would expect to pay you an equivalent fixed fee on the amount actually spent. You, of course understand Mr. Dunn, from the questionnaire, that it is not contemplated that any of your executive officers or any member of the firm, if either of you are *are* a partnership, will be paid on a reimbursable basis.

Mr. Dunn: Yes Sir, we understood that.

Mr. Loving: You likewise understand that we have adopted a policy of paying no man on any project in excess of \$9,000 or more than he earned last year. However, in determining his present salary recognition will be given to the fact that double shift operations may be required which would result in the man doing twice the normal work that he would do. Under these circumstances I think we would recognize a reasonable increase in his salary, which increases, however, must be approved by the Constructing Quartermaster.

Mr. Dunn: We had understood that.

Mr. Loving: Mr. Dunn, have you handled other work on a cost-plus basis on which you placed your equipment on a rental basis?

Mr. Dunn: Yes, we have done that.

[fol. 119] Mr. Loving: Have you in general followed the rental schedule established by the Associated General Contractors which is recognized and considered by both owners, clients, engineers, architects and suppliers of equipment as being the best standard available at this time.

Mr. Dunn: In general, that has been our rule.

Mr. Loving: In such instances has the lessee of the equipment paid the freight both ways?

Mr. Dunn: Yes, sir.

Mr. Loving: You would expect that in this instance?

Mr. Dunn: Yes sir.

Mr. Loving: There are certain formalities that must be gone through from now on, Mr. Dunn, the first being to secure the clearance of our negotiated agreement by the National Defense Council. It is hoped that this may be accomplished tomorrow and that the contract may be ready for execution, we hope, by tomorrow. Is it your plan to remain in the city until that is accomplished?

Mr. Dunn: If you think it will be done tomorrow, I will be mighty glad to remain in the city. Mr. Hodgson will remain anyway, whether I go home or not. If I go home tomorrow I will return Sunday ni-te and be here Monday morning. I would prefer to do that, but I don't want to delay this. I would like to say that I am subject to your orders or wishes in this matter.

Mr. Loving: Under the conditions we anticipate may arise I think if you are back by Monday morning that will be sufficiently early. Before we adjourn, I want to ask that you

hold this meeting in strict confidence and do not announce to anyone that you have been selected, subject to the approval of the National Defense Council and The Assistant Secretary of War until after the contract has actually been executed.

Mr. Dunn: We will be glad to do that, sir.

EXHIBIT "E"

WBH/SEB

February 8, 1941.

Memorandum To Dunn Construction Company, Inc., John S. Hodgson & Company, Fort McClellan, Alabama.

1. Attached is a list of your Administrative and Field Overhead as of February 1, 1941. With the Project in the finishing stages and with the field force so greatly reduced, it is the opinion of this office that the high price overhead is entirely out of line.

[fol. 120] 2. It is requested that steps be taken to reduce this administrative and field overhead.

(S.) Wm. H. Bell, Jr., Major, Q. M. C., Constructing Quartermaster.

EXHIBIT "F"

DBJ/esh

War Department

**Office of the Constructing Quartermaster,
Fort McClellan, Alabama**

November 14, 1940.

In Reply Refer to QM 248.

Subject: Over-time for Sheet Metal Workers.

Memorandum to Dunn Construction Co. and John S. Hodgson Co., Fort McClellan, Ala.

1. Due to the severe cold weather and the immediate necessity for heat in such buildings as are now occupied by

troops, and due to the limited number of sheet metal workers available, you are authorized to work sheet metal workers over-time to the extent that is necessary to take care of the present emergency.

For the Constructing Quartermaster.

(S.) Dudley B. Jones, Capt. (FA) Q. M.-Res., Executive Officer.

cc to Mr. Spicer.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "G"

MPA/SEB

War Department

Office of the Constructing Quartermaster,
Fort McClellan, Alabama

November 12, 1940.

In reply refer to —.

Dunn Construction Company, Inc., John S. Hodgson & Company, Fort McClellan, Alabama.

1. This is to inform you that all wages with the exception of office help paid for Armistice Day, November 11th, are to be calculated at time and one-half.

[fol. 121] (S.) S. C. MacIntire, Jr., Major, Q. M.-Res., Constructing Quartermaster.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "H"

Dunn Construction Co., Inc.
And
John S. Hodgson & Co.
Contractors
Fort McClellan, Alabama

February 17, 1941.

Major Wm. H. Bell, Jr., Constructing Quartermaster, Fort
McClellan, Alabama.

DEAR SIR:

Permission is hereby requested for electricians to work overtime as of this date to install motor in the Asphalt Plant.

Very truly yours, Dunn Construction Co., Inc., and
John S. Hodgson & Company, by (S.) G. H. Stout,
Project Manager.

GHS/gp.

Certified a true copy. Thomas H. Doyle, Captain, Q. M.
C., Constructing Quartermaster.

EXHIBIT "I"

War Department
Office of the Constructing Quartermaster,
Fort McClellan, Alabama

February 17, 1941.

In reply refer to —.

Memorandum To Dunn Construction Company, Inc., John
S. Hodgson & Company, Fort McClellan, Alabama.

1. You are authorized to work electricians overtime to install the motor in the Asphalt Plant.

(S.) Wm. H. Bell, Jr., Major, Q. M. C., Constructing
Quartermaster.

Certified a true copy. Thomas H. Doyle, Captain, Q. M.
C., Constructing Quartermaster.

[fol. 122] IN CIRCUIT COURT OF MONTGOMERY COUNTY

ORDER OF SUBMISSION—June 13, 1941

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register. June 13, 1941.

Walter B. Jones, Judge.

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTE OF SUBMISSION—June 13, 1941

Complainant, being called, offers the following testimony, to-wit:

1st. Bill for Declaratory Judgment, and amendment thereto.

2nd. Transcript from Department of Revenue.

3rd. *Argeed* Statement of Facts.

4th. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and exhibits thereto.

Defendant, being also called, offers the following testimony, to-wit:

1st. Demurrer and answer to Bill or Petition as amended.

2nd. Transcript from Department of Revenue.

3rd. Agreed Statement of Facts.

4th. Testimony of Complainant's witnesses on cross-examination, and exhibits thereto.

I hereby certify that the above Note of Testimony is correct, this 13th day of June, A. D. 1941.

Geo. H. Jones, Jr., Register, Thomas D. Samford. United States Attorney, and Hartwell Davis, Assistant United States Attorney, Solicitors for Complainants. Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; Edward Thornton, Assistant Attorney General, Solicitors for Defendant.

[fol. 123] IN CIRCUIT COURT OF MONTGOMERY COUNTY

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc. and John S. Hodgson and Company, Plaintiffs,

vs.

JOHN C. CURRY, Individually and as Commissioner of Revenue of the State of Alabama, Defendant

FINAL DECREE—Filed June 13, 1941

This cause coming on to be heard was submitted for a final decree on May 29, 1941, upon the petition for a declaratory judgment, the answer thereto, and the testimony offered on behalf of the plaintiffs and the defendant as noted by the Register, including a written stipulation of facts filed in this cause; and it appearing to the Court that the assessment mentioned in said petition made by the State Department of Revenue of the State of Alabama on May 8, 1941, against Dunn Construction Company, Inc., and John S. Hodgson and Company, for use taxes ascertained and determined to be due by them under the provisions of the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, approved February 8, 1939, for the quarterly period beginning January 1, 1941, and ending March 31, 1941, in the aggregate amount of \$51.12, including tax, penalty and interest, was validly made; that said plaintiffs, Dunn Construction Company, Inc. and John S. Hodgson and Company are not entitled to a refund of the amount of said assessment paid by them under protest; that neither the levy, assessment nor collection of said tax by the State of Alabama against the said Dunn Construction Company, Inc., and John S. Hodgson and Company, under the facts and circumstances shown in this cause, for the period involved in said assessment, was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States of America; that neither said Dunn Construction Company, Inc., nor said John S. Hodgson and Company, whether acting separately or jointly, was, during the period covered by said assessment, an agent or instrumentality of the United States; nor does it appear that the imposition of said tax constituted a prohibited interference with the performance by them of the contract executed by

and between them and the United States of America, under date of September 9, 1940, and in connection with the performance of which contract said contractors incurred such tax liability; that neither said act nor said assessment imposed a direct burden upon the United States; and that such burden as is imposed upon the United States with respect to such tax is remote and consequential, for the amount of which the United States expressly agreed to reimburse said contractors as a part of the cost of the construction provided for under the terms of said contract. It is, therefore,

Adjudged, Decreed and Declared That said assessment in the aggregate amount of \$51.12 made by the State Department of Revenue of the State of Alabama against Dunn Construction Company, Inc., and John S. Hodgson and Company on the 8th day of May, 1941, under the provisions of the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, approved February 8, 1939, for the quarterly period beginning January 1, 1941, and ending March 31, 1941, is legal and valid in all respects, and that said Dunn Construction Company, Inc., and John S. Hodgson and Company were legally liable to the State of Alabama for said taxes, penalty and interest thereon, assessed against them. It is further

Adjudged, Decreed and Declared That said Dunn Construction Company, Inc., and John S. Hodgson and Company are not entitled to a refund of said taxes, penalty, or interest heretofore paid by them under and pursuant to said assessment. It is further

Adjudged, Decreed and Declared That the costs in this cause be paid by the plaintiffs, for which execution may issue.

Done in open court at Montgomery, Alabama, this the 13 day of June, 1941.

Walter B. Jones, Circuit Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed June 16, 1941

Comes now United States of America, and Dunn Construction Company, Inc., and John S. Hodgson and Com-

pany, partners doing business as Dunn Construction Company, Inc., and John S. Hodgson and Company, and give notice that an appeal is taken from a decree entered in this cause on June 13, 1941.

This 16th day of June, 1941.

United States of America, and Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company, by Thomas D. Samford, United States Attorney.

[File endorsement omitted.]

Security for Costs of Appeal, filed June 16, 1941, omitted in printing.

[fol. 126] Citation in usual form showing service on Thomas S. Lawson, omitted in printing.

[fol. 127] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity, do hereby certify that an appeal was taken in the above stated cause on the 16th day of June, 1941, by the Complainants, from a decree rendered in said cause on the 13th day of June, 1941, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the present term of said Court.

I further certify that John S. Hodgson and Company, a partnership composed of John S. Hodgson and Alcie J. Hodgson, is principal, and National Surety Corporation, is surety, for the costs of said appeal.

Given under my hand and seal of office, this the 17th day of June, 1941.

Geo. H. Jones, Jr., Register of the Circuit Court
of Montgomery County, Alabama, In Equity.
(Seal.)

[fol. 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 129] IN SUPREME COURT OF ALABAMA

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company, Plaintiffs,

v.

JOHN C. CURRY, Individually and as Commissioner of Revenue of the State of Alabama, Defendant

ASSIGNMENT OF ERRORS

The Court erred in holding:

(1) That the assessment made by State of Alabama on May 8th, 1941, against Dunn and Hodgson, as contractors, for use taxes for the quarterly period ending March 31, 1941, was valid.

(2) That said contractors are not entitled to a refund of the amount of said assessment paid under protest.

(3) That neither the levy, assessment nor collection of said tax was contrary to any provision, express or implied, of the Constitution of the United States, or in violation of any right or immunity of the United States.

(4) That neither Dunn nor Hodgson, acting separately or jointly, was an agent or instrumentality of the United States.

(5) That the imposition of said tax did not constitute a prohibited interference with the performance by said contractors of their contract with the United States dated September 9, 1940.

(6) That neither the Alabama statute under which the tax was purportedly levied, nor the said assessment, imposed a direct burden upon the United States.

(7) That such burden as is imposed upon the United States by such tax is remote and consequential.

(8) That the United States has expressly agreed to reimburse the said contractors for such taxes as a part of the cost of the construction provided for under the terms of said contract.

[fol. 130] (9) That said contractors were legally liable for said taxes, penalty and interest.

The Court erred in failing to hold:

(10) That the purchase, storage, use and consumption of the roofing materials involved were by the United States or by said contractors as agents and instrumentalities of the United States, in execution of the said contract September 9, 1940.

(11) That the purchase, storage, use and consumption of the said roofing materials is immune from taxation by the State of Alabama under the Constitution of the United States.

(12) That the purchase, storage, use and consumption of the said roofing materials is exempt from the said tax under Subsection E of Section 3 of Act No. 67 of the General Acts of Alabama, Regular Session, 1939.

(13) That the said roofing materials were stored, used and consumed at Camp McClellan, Anniston, Alabama; that said Camp is within an area within the exclusive jurisdiction of the United States; and that such storage, use and consumption are immune from taxation by the State of Alabama under the Constitution of the United States.

(14) That the State Department of Revenue in applying Act No. 67 aforesaid to the purchase, storage, use and consumption of the said roofing materials have applied Act No. 67 aforesaid in a manner which renders said Act invalid and void under the Constitution of the United States.

(15) That Act No. 67 aforesaid, in so far as it subjects to taxation the purchase, storage, use and consumption of the aforesaid roofing materials, is invalid and void because violative of the Constitution of the United States.

(Signed) Thomas D. Samford, United States Attorney, Attorney for Appellants.

[fol. 131] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF ARGUMENT AND SUBMISSION—June 23, 1941

Come the parties by attorneys, and argue and submit this cause for decision with 3 Div. No. 351.

[fol. 132] IN SUPREME COURT OF ALABAMA

ORDER CONVENING SPECIAL TERM OF COURT—July 28, 1941.

It is ordered that a Special Term of the Supreme Court of Alabama be begun and held at the Judicial Building in Montgomery, Alabama, on Monday, July 28th, 1941, for the purpose of considering and disposing of any and all matters as the Court may determine, and to continue in session from day to day until adjourned by the Court.

Lucien D. Gardner, Chief Justice. William H. Thomas, Associate Justice. Virgil Bouldin, Associate Justice. Joel B. Brown, Associate Justice. Arthus B. Foster, Associate Justice. — —, — —, Associate Justice. J. Ed. Livingston, Associate Justice.

[fol. 133] In compliance with the foregoing order, a Special Term of the Supreme Court was begun and holden according to law on July 28th, 1941.

Present as Justices of said Court: Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston. Knight, J., not sitting.

Present as Officers of the Court: Clerk, J. Render Thomas. Marshal, Travis Williams.

The Supreme Court adjourned until Tuesday, July 29th, 1941, at 10 o'clock A. M.

[fol. 134] IN SUPREME COURT OF ALABAMA

3 Div. 350

MONTGOMERY CIRCUIT COURT IN EQUITY

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON AND COMPANY, Partners d/b as Dunn Construction Company, Inc., and John S. Hodgson and Company,

VS.

JOHN C. CURRY, Individually, and as Commissioner of Revenue of the State of Alabama

DECREE OF REVERSAL AND RENDITION—July 29, 1941

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered and ordered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree that the Circuit Court should have rendered, doth order, adjudge, decree and declare that the assessment in the aggregate amount of \$51.12 made by the State Department of Revenue of the State of Alabama against Dunn Construction Company, Inc., and John S. Hodgson & Company, on the 8th day of May, 1941, under the provisions of the Alabama Use Tax Act, for the quarterly period beginning January 1st, 1941, and ending March 31st, 1941, is illegal and invalid, and that the Appellants are not and were not liable for said taxes so assessed against said Appellants, Dunn Construction Company, Inc., and John S. Hodgson & Company, a Partnership, and that said [fol. 135] Appellants, the said Dunn Construction Company, Inc., and John S. Hodgson & Company, are entitled to a refund of the said tax, penalty and interest paid by them in the aggregate amount of \$51.12.

It is also considered, ordered, adjudged and decreed that the costs of appeal of this Court and all of the costs of the Circuit Court be taxed against the Appellee.

[fol. 136] IN THE SUPREME COURT OF ALABAMA

UNITED STATES OF AMERICA ET AL.

v.

JOHN C. CURRY, Commissioner of Revenue

Appeal from Montgomery Circuit Court in Equity

OPINION

LIVINGSTON, Justice.

The questions presented for decision in this case are substantially the same as those discussed and decided in the case of King and Boozer v. State of Alabama—the two cases having been argued and submitted together.

It results therefore that the decree of the lower court is reversed and rendered on the authority of King and Boozer v. State of Alabama, this day decided.

Reversed and rendered.

Gardner, C. J., Thomas, Bouldin and Foster, JJ., concur.

Brown, J., dissents, being of the opinion that the decree of the lower court should be affirmed.

Knight, J., not sitting.

[fol. 137]

DISSENTING OPINION

BROWN, Justice, (Dissenting):

The tax levy involved in this case, made by the State Department of Revenue, is not against the government or its instrumentalities, but against Dunn Construction Company, Inc., and John S. Hodgson and Company, independent contractors, operating for profit, under the provisions of Act No. 67, approved February 28, 1939, Acts 1939, pp. 96-109, after the Act of Congress waiving exclusive jurisdiction over Camp McClellan, Anniston, Alabama, in respect to the levy and collection of these taxes, here in controversy.

To quote from the brief filed by the appellant:

“The Dunn Construction Company, Inc., is a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Alabama at Birmingham, Alabama, in which corporation the United

States owns no interest. John S. Hodgson and Company is a partnership composed of John S. Hodgson and Alice J. Hodgson, both of the City of Birmingham, Alabama."

The said above named parties were under contract with the United States to construct certain buildings at Fort McClellan, and engaged in said contract, to furnish "all labor, *materials*, tools, machinery, equipment facilities *and supplies* necessary for the completion of the work." (Italics supplied.)

The material, the use of which constitutes the basis of the levy, was purchased by said contractors at retail out of the State of Alabama, and shipped into the State for use by said contractors and was used in the performance of their contract with the United States, was paid for by said contractors on their own account, including the tax, and they made claim for a refund on the ground that the levy was in effect a levy of tax against the United States.

Said Act No. 67, in Section II thereof provides:

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section." Acts 1939, p. 98, Code 1940, Tit. 51, § 789. [fol. 138] See, National Linen Service Corporation v. State Tax Commission, 237 Ala. 360, 186 So. 478; Durr Drug Co. v. Long, et al., 237 Ala. 689, 188 So. 873; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546.

Subsection (b), exempts "property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state."

As before stated, the levy is not against the government or its instrumentalities, but against said contractors operating for private profit, and the contract under which they are operating provides for reimbursement for the costs of the material including taxes for which said contractors are liable. If the United States is liable its liability is contractual, and not by force of the statute.

I am therefore of opinion that the decree of the Circuit Court affirming the levy was free from error, and should be affirmed. I, therefore, respectfully dissent.

[fol. 139] IN THE SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY OF DECREE

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama:

Comes John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee in the above styled cause, and respectfully shows unto this Court as follows:

1. That on the 29th day of July, 1941, this Court, in the above styled cause, rendered an opinion and entered a final decree reversing the decision and decree of the Circuit Court of Montgomery County, Alabama, In Equity, and rendering a final decree in said cause in favor of Appellants and against this Petitioner.

2. That this Petitioner, being dissatisfied with said final decree, desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to be directed to this Court ordering and directing that the record in this case be certified to it for the purpose of reviewing the same.

3. That said Petitioner is allowed by law three (3) months after the entry of said final decree on the 29th day of July, 1941, in which to make application for such writ.

Wherefore, Petitioner prays that a stay of said decree and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary [fol. 140] to enable the Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, be granted by this Court for the purpose of allowing the Petitioner to apply for and obtain such writ; and the Petitioner further prays that the issuance of the certificate to the Circuit Court be stayed during said period, and that if the same has already issued, that it be recalled by this Court.

(Signed) Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General, Attorneys for Petitioner.

Petition filed and granted this the 2nd day of August, 1941, without bond or security. It is, therefore, ordered that said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama.

I hereby certify that I have this the 2nd day of August, 1941, mailed a copy of the foregoing petition and order, postage prepaid, to Fred L. Blackmon, Esquire, Anniston, Alabama, Samuel O. Clark, Jr., Esquire, Department of Justice, Washington, D. C., Thomas D. Samford, Esquire, Montgomery, Alabama, Attorneys of record for Appellants.

(Signed) John W. Lapsley, Assistant Attorney General.

[fol. 141] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING DECREE—August 2, 1941

Comes the Petitioner, John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, by attorneys, and the Petition praying that a stay of the decree of the Supreme Court of Alabama and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable Petitioner to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States, and further praying that the certificate to the Circuit Court, In Equity, be recalled pending application for Writ of Certiorari to the Supreme Court of the United States, being duly examined and understood, it is considered and ordered that the Petition be and the same is hereby granted without bond or

security. It is therefore ordered that the said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama.

[fol. 142] IN SUPREME COURT OF ALABAMA

CERTIFICATE OF RECALL PENDING APPLICATION FOR CERTIORARI

To the Register of the Circuit Court of Montgomery County,
Greeting:

Whereas, in the matter of United States of America, et al., Appellants, vs. John C. Curry, Commissioner of Revenue, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Circuit Court of Montgomery County, our Supreme Court did on the 29th day of July, 1941, render a decree of Reversal and Rendition in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter a Petition to stay the decree and the execution and enforcement thereof was filed in this Court on the 2nd day of August, 1941: said Petition being granted on said date.

Now, it is hereby certified, that our Supreme Court, or one of the Justices thereof, did, on the 2nd day of August, 1941, order that said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you, pending application for Writ of Certiorari to the Supreme Court of the United States.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 4th day of August, 1941.

(Signed) J. Render Thomas, Clerk of the Supreme Court of Alabama.

[fol. 143] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: Enter Thos. S. Lawson, File No. 45,931, Alabama Supreme Court, Term No. 603. John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, Petitioner vs. The United States of America, Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941, Term No. 603 O. T., 1941.

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

(6760)